This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

THE

Western Law Reporter

(CANADA)

AND

INDEX-DIGEST

APRIL-AUGUST, 1908.

EDITOR:
EDWARD B. BROWN, K.C.

VOLUME VIII.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1908.

190871

STANFORD LIBRARY

TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME VIII. OF THE WESTERN LAW REPORTER (CANADA)

(APRIL-AUGUST, 1908.)

A.

Alexander v. Thompson (Alta.), 659.
Allman v. Yukon Consolidated Gold Fields Co. (Y.T.), 371, 373.
Alloway v. Pamranke (Sask.) 134.
Alloway v. Rural Municipality of Morris (Man.), 726.
Anchor Elevator Co. v. Heney (Man.), 735.
Anderson v. Douglas (Man.), 520.
Anderson, P., & Co. v. Archibald (Alta.), 916.
Anderton, *Re* (Alta.), 319.
Anglo-American Fire Insurance Co. v. Coulthard-Alexander Co. (Sask.), 74.
Annable and Annable, *Re* (Sask.), 132.

B.

Bannerman v. Detroit Yukon Mining Co. (Y. T.), 714.
Bannerman v. Green (Sask.), 441.
Barnard v. Freeman (Y. T.), 721.
Barrette v. Canadian Bank of Commerce and Syndicat Lyonnais Du Klondike (Y.T.), 927.
Bates v. Cannon (Man.), 575.
Battell v. Hudson's Bay Co. (Sask.), 760.
Beaver Lumber Co. v. Eckstein (Sask.), 439.
Beaver Lumber Co. v. Northern Construction Co. (Sask.), 782.
Behari Lal, *Re* (B.C.), 129.
Bennetto v. Canadian Pacific R. W. Co. (Man.), 197.
Bent v. Arrowhead Lumber Co. (Man.), 594.
Bewell v. Wheat City Flour Co. (Man.), 273.
Bloomstein v. J. D. McArthur Co. (Man.), 753.
Bonnell v. Hoggins (B.C.), 395.
Bridgman v. Hepburn (B.C.), 28.
Bryce v. Canadian Pacific R. W. Co. (B.C.), 230.
Buckworth v. Nelson and Fort Shennard R. W. Co. (B.C.), 43.
Burke v. Nolin (Sask.), 830.

C.

Cairns v. Crawford (Man.), 449.
Calvert v. Canadian Northern R. W. Co. (Man.), 379.
Campbell v. Imperial Loan Co. (Man.), 502.
Canadian Bank of Commerce v. Matheson (Y.T.), 972.
Canadian Bank of Commerce v. Wilson (Y.T.), 266.
Canadian Co-operative Co. v. Trauniczek (Sask.), 550.
Canadian Northern R. W. Co. and Robinson, *Re* (Man.), 137.
Canadian Pacific R. W. Co. v. Mang (Sask.), 774.
Canadian Pacific R. W. Co. v. Meadows (Alta.), 806.
Canadian Railway Accident Insurance Co. v. Kelly (Man.), 738.
Carberry Gas Co. v. Hallett (Man.), 119.
Carruthers v. Beisiegel (Alta.), 255.
Charrest v. Manitoba Cold Storage Co. (Man.), 110.
Christie v. Shroeder (Man.), 757.
Clarke v. Moore and Galbraith (Alta.), 411.
Clarke v. Moore and Simpson (Alta.), 405.
Cleveland v. Asam (Y.T.), 970.
Confederation Life Association v. Leier (Sask.), 343.
Cotter v. Osborne (Man.), 451.
Craftsmen Limited v. Hunter (Sask.), 435.
Crown Lumber Co. v. Fitzsimmons (Sask.), 544.
Crown Mutual Hail Insurance Co. *Re* (Man.), 580.
Cummings v. Semerad (Alta.), 644.

D.

Davis v. O'Brien (Man.), 562.
Davison v. Schwartz (Y.T.), 559.
Day and Henwood, Ex p. (Alta.), 533, 536.
DeClerval v. Jones (Alta.), 300.
Deering Harvester Co. v. Black (Sask.), 91.

Detro v. Haggard (Alta.), 156.
Doody v. Bigelow (Y.T.), 978.
Dunn v. Callaghan (Alta.), 169.

E.

Elleman v. Carruthers (Sask.), 692.
Elvin v. Clough (Man.), 590.
Equity Fire Insurance Co. v. Coulthard-Alexander Co. (Sask.), 74.
Excelsior Life Insurance Co. v. Prestniak (Sask.), 780.

F.

Fernie Liquor Appeal, *Re* (B.C.), 394.
Ferrara v. Bligh (B.C.), 245.
Flora v. Shandro (Alta.), 426.
Follis v. Schaake Machine Works Limited (B.C.), 14.
Foss v. Hill (B.C.), 224.
Foster v. Woodworth (Sask.), 688.
Foulds v. Bowler (Man.), 189.
Fraser v. Canadian Pacific R. W. Co. (Man.), 380.
Fredkin v. Glines (Man.), 587.

G.

Gillespie v. Gillespie (Man.), 725.
Gilroy v. Proe (Sask.), 81, 777.
Gorman v. Henderson (Alta.), 422.
Gorman, Clancey, & Grindley v. Archibald (Alta.), 916.
Graham v. Bricklayers and Masons' Union (B.C.), 281.
Graves v. Mason (Alta.), 265, 542.
Gray v. Daniels (B.C.), 246.
Great Prairie Investment Co., *Re* (Man.), 6.
Great West Implement Co. v. Grams (Alta.), 160.
Green v. World Printing and Publishing Co. (B.C.), 210.

H.

Haffner v. Cordingley (Man.), 743.
Halsted v. Herschmann (Man.), 641.
Hammond v. Strong (Y.T.), 362.
Hannah v. Graham (Man.), 271.
Harris v. Darroch (Sask.), 86.
Hayes v. Day (Alta.), 143.
High River Meat Market v. Routledge (Alta.), 259.
Hogan v. Boozan (Sask.), 548.
Holmes v. Brown (Man.), 459.
Huggard v. Ontario and Saskatchewan Land Corporation (Sask.), 866.
Huntting v. Macadam (B.C.), 214.
Hutchinson v. Schleuter (Sask.), 682.
Hutchison v. Johnston (B.C.), 251.
Hutchison Brothers & Co. Limited v. Perkins (B.C.), 16.
Hyde v. Reid (Sask.), 555.

I.

Irwin v. Kelly (Y.T.), 95, 855.

J.

Jalbert v. Jensen (Y.T.), 377.
Johnston v. Hadden (B.C.), 526.
Jones v. Central Canada Insurance Co. (Sask.), 614.
Jones v. Okada (Y.T.), 557.
Jones v. Twohey (Alta.), 2[illegible].

K.

Kdjr v. The "Spray," (B.C.), 46.
Kent v. Clarke (Sask.), 617.

L.

Local Improvement District No. 26 A5 v. Walters (Alta.), 176.
Ludwig v. Beede (Y.T.), 973.
Luxfer Prism Co. v. Macleod (Sask.), 627.

M.

McDougall v. Johansen (Y.T.), 955.
McDougall v. Kerr (Alta.), 528.
McInnes v. British Columbia Electric R. W. Co. (B.C.), 277.
McIntyre v. Gibson (Man.), 202.
McManus v. Wilson (Man.), 106.
Malsufuro, *Re* (B.C.), 37.
Mason and Risch Piano Co. v. Canadian Pacific R. W. Co. (Sask.), 951.
Mears v. Arcola Wood Working Co. (Sask.), 840.
Merriam v. Parish (Alta.), 340.
Mey v. Simpson (Man.), 472.
Milestone v. City of Moose Jaw (Sask.), 901.
Minger & Weber v. Anderson (Alta.), 428.
Moodie v. Young (Alta.), 310.
Moore v. Shackleford (Y.T.), 1.
Muller v. Shibley (B.C.), 42.
Munroe v. Beischel (Sask.), 63, 846.
Munroe v. Henbach (Man.), 785.
Mussetter, *Re* (Sask.), 704.

N.

Nakane, *Re* (B.C.), 19.
Neilson, *Re* (B.C.), 400.
Nelson Ford Lumber Co., *Re* (Sask.), 79, 546.
Niblock v. Ross (Alta.), 7[illegible].
Nicholson v. Peterson (Man.), 750.
North-West Thresher Co. v. Andrews (Alta.), 827.
Norton v. Canadian Bank of Commerce (Sask.), 910.
Novak v. Abrahams (Y.T.), 922.

O.

O'Connor v. Peltier (Man.), 576.
Okasake, *Re* (B.C.), 19.
Oldstadt v. Lineham (Alta.), 152.
O'Neil v. Drinkle (Sask.), 937.

P.

Parrat v. Cheales (B.C.), 404.
Patterson v. Edmonton Bulletin Co. (Alta.), 612.
Peters v. Perras (Alta.), 162.
Phiscator, *Re* (Y.T.), 716.
Poliquin v. St. Boniface (Man.), 561.
Porter v. Rooney (Alta.), 289.
Potts v. Imperial Bank of Canada (Man.), 583.
Pulkrabek v. Rural Municipality of Russell (Man.), 8.

R.

Reeves v. Konschur (Sask.), 346.
Reeves & Co. v. Chase (Alta.), 313.
Regina Heating and Plumbing Co. v. Gillespie (Sask.), 93.
Reid, *Re* (Man.), 393.
Rex v. Baird (Sask.), 65.
Rex v. Barrett (Sask.), 877.
Rex v. Canadian Northern R. W. Co. (Sask.), 889.
Rex v. Canadian Pacific R. W. Co. (Alta.), 825.
Rex v. Canadian Pacific R. W. Co. (Sask.), 899.
Rex v. Clegg (Man.), 572.
Rex v. Harris (Y.T.), 633.
Rex v. Labourdette (B.C.), 402.
Rex v. L'Heureux (Y.T.), 975.
Rex v. Mitchell (Y.T.), 357.
Rex x. Narain (B.C.), 790.
Rex v. Regan (B.C.), 525.
Rex v. Scherf (B.C.), 219.
Rex v. Sheehan (B.C.), 605.
Rex v. Smith (B.C.), 184.
Rex v. The "Carlotta G. Cox" (B.C.), 124.
Rex v. Thompson (Man.), 3.
Rex v. Walkem (B.C.), 857.
Rex *ex rel.* Tobey v. McDonald (Sask.), 83.
Robert and Weir, *Re* (Sask.), 69.
Robertson v. Morris (Alta.), 611.
Ross Brothers Limited v. Gorman (Alta.), 413.
Roy v. Henderson (Man.), 187.
Roylance v. Canadian Pacific R. W. Co. (B.C.), 399.
Russia, Emperor of. v. Prospouriakoff (Man.), 10, 461.
Rutherford v. Walker (Alta.), 52.
Rutledge v. Astell (Sask.), 934.

S.

Saskatchewan Lumber Co. v. Michaud (Sask.), 946.
Sawyer-Massey Co. v. Boyce (Sask.), 834.
Seaborn and Hansberger, *Re* (Sask.), 71.
Scott v. McCarter (B.C.), 228.
Scott v. Milne (B.C.), 23.
Sieling v. Village of Kronau (Sask.), 552.
Skinner v. Shirkey and Morris (Alta.), 56.
Smith v. Consolidated Mining and Smelting Co. of Canada (B.C.), 47.
Smith v. Livingston (B.C.), 242.
Smith, *Re* (Sask.), 131.
Smyth v. Canadian Pacific R. W. Co. (Sask.), 700.
Solicitor, *Re* (Alta.), 533, 536.
Stennett v. City of Edmonton (Alta.), 62.
Stewart v. Hall (Man.), 479.
Stirton v. Harvey (Man.), 185.
Stoney Plain Municipal Election, *Re* (Alta.), 54.
Swan v. Canadian Northern R. W. Co. (Alta.), 662.
Swanson v. Getsman (Sask.), 762.
Swanson v. Grahame (B.C.), 48, 982.

T.

Tait and Sutherland v. Gibson Lumber Co. (Sask.), 350.
Tavender v. Edwards (Alta.), 308.
Taylor v. Poirier (Sask.), 949.
Teague v. Scoular (Man.), 199.
Theo Noel Co. v. Vitæ Ore Co. (Man.), 643.
Thompson v. Milling (Sask.), 622.
Tirschmann v. Schultz (Man.), 210.
Toll v. Canadian Pacific R. W. Co. (Alta.), 795..
Toseo v. Campbell (Y.T.), 719.
Traders Bank of Canada v. Wright (Man.), 105, 208, 389, 747.
Turner v. Tymchorak (Man.), 484.
Tuytens v. Noble (B.C.), 50.

U.

Union Bank v. Jordon (Sask.), 77.
Union Investment Co. v. Pullishy (Alta), 530.
Union Lumber Co. v. Porter (Alta.), 423.
United Mine Workers of America, District No. 18, v. Strathcona Coal Co. (Alta.), 649.

V.

Vanstone v. Scott (Alta.), 919.
Vopni v. Bell (Man.), 205.

W.

Waterous Engine Works Co. v. Okanagan Lumber Co. (B.C.), 278.
Waterous Engine Works Co. v. Weaver (Sask.), 432.
Watt v. Watt (Sask.), 953.
Westaway v. Stewart (Sask.), 907.
Whitman Fish Co. v. Winnipeg Fish Co. (Man.), 488.
Winterburn Farm Co. v. Edmonton, Yukon, and Pacific R. W. Co. (Alta.), 815.
Wilson, *Re* (Alta.), 607.
Wolf, *Re* (Sask.), 690.

Y.

Yukon Consolidated Gold Fields Co. v. Schmidt (Y.T.), 708.
Yukon Trust Co. v. Popich (Y.T.), 852.

THE

Western Law Reporter

VOL. VIII. TORONTO, MAY 1, 1908. No. 1.

YUKON TERRITORY.

CRAIG, J. MARCH 30TH, 1908.

CHAMBERS.

MOORE v. SHACKLEFORD.

Appeal to Court en Banc—Extension of Time for—Explanation of Delay—Special Circumstances.

Motion by defendant for leave to appeal from an order committing him to gaol for 6 months.

C. W. C. Tabor, for defendant.

R. L. Ashbaugh, for plaintiff.

CRAIG, J.:—The defendant is a judgment debtor, and was on 25th November, 1907, examined under our Collection of Debts Ordinance by myself, and I found that he had incurred the debt fraudulently, and under the Ordinance ordered him to be committed to gaol for 6 months. At the request of the defendant, that order was held suspended for one month to enable him to pay. On 27th December, payment not having been made, he was arrested under the order, which was that day signed. On 14th February summons was issued to shew cause why a writ of habeas corpus should not be issued, and that motion was heard on 2nd March and refused; the reasons will be seen in my written judgment upon that motion, 7 W. L. R. 930.

On 12th March instant notice of motion for leave to appeal from the original order was served, and that motion was heard on 23rd March.

By the affidavit of the solicitor for the defendant it appears that negotiations were started with the plaintiff's

solicitor on 6th January for a settlement, and the affidavit states that during the negotiations the time for appeal elapsed. No action was taken until 24th January, when, as appears by the affidavit, instructions were given to proceed by way of habeas corpus. The solicitor says that the defendant is anxious to appeal.

The affidavit of the solicitor for the plaintiff in answer is that during the negotiations $200 offered as part payment of the debt, which the defendant then had in hand; but that the negotiations went off on the question of security for the appearance of the defendant for future examination. There is no evidence that the defendant gave any instructions to appeal at any time prior to the motion for habeas corpus. He had the whole of the month of December when the order was suspended to appeal from it and the subsequent times.

The question now is whether I shall use my discretion in giving him leave to appeal at this late date. Counsel for the defendant says that the grounds of the appeal are the grounds urged formerly on the motion for habeas corpus; that is, the irregularity of the proceedings. No merits are urged, no cause given for the delay but the negotiations before mentioned; in short, the defendant, having exhausted all other means of obtaining his release, now seeks to appeal, and for the first time we hear of any intention to appeal. I think the motion is too late. I do not think that the indulgence should be given, because it is only an indulgence that the defendant is asking for. He gives me no sufficient reasons why I should grant him this indulgence.

Upon this question of extending time for leave to appeal after the expiry of the date, I might refer to my own judgment in Munroe v. Morrison, 2 W. L. R. 367, where I considered all the leading authorities. I would also add to those cases Gilbert v. Jervis, 2 Ch. Ch. 259, and particularly would direct attention to the words of Thesiger, L.J., in Craig v. Phillips, 7 Ch. D. 249, as follows: "I am of opinion that this Court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time."

In the case which I am considering, there are not any circumstances whatever shewn to satisfy me that I should use my discretion as asked. I, therefore, refuse the motion with costs; but if any leave is necessary to enable the defendant to appeal from this judgment, he has that leave.

MANITOBA.

HOWELL, C.J.A. MARCH 24TH, 1908.

TRIAL.

REX v. THOMPSON.

Criminal Law—Procedure—Summary Trial before County Court Judge—Election of Prisoners—Indictment at Assizes—Grand Jury—Prisoners called on to Plead—Re-election.

A magistrate committed the prisoners for trial for an offence within sec. 582 of the Code, and the prisoners were not committed to gaol for trial, but obtained bail. At the spring assizes indictments were preferred by the Crown for charges set forth in the depositions of the committing magistrate, and the grand jury found a true bill, while the accused were still out on bail. It appeared that after the bill was found the sureties for the accused delivered them into custody, and while so in custody the sheriff under sec. 826 of the Code took them before a County Court Judge, and they then and there elected to take a speedy trial. After this election, and after the County Court Judge had fixed a time for trial, but before the trial, they were arraigned at the assizes to plead to the indictments found by the grand jury. On their arraignment, their counsel pleaded that they had been surrendered after the indictment had been found, and had elected to take a speedy trial, and he contended that they should not be called upon to plead to the indictment.

G. Patterson, for the Crown.

W. Manahan, for the prisoners.

HOWELL, C.J.A.:—Originally, the only way by which these prisoners could have been tried was, of course, under the indictment. In order to save the great delay to which prisoners were put in awaiting their trial, and to save the expense of a jury trial, it was many years ago provided that a prisoner had a right to elect to be tried without a jury by the County Court Judge out of session, but, as the law originally stood, as soon as the Court before which the prisoner's

trial would be taken was in session, there was no power or right to elect, and the trial was had before a jury. From time to time since then the practice in criminal cases has been amended so as to extend the power of election. By sec. 828 of the Code, even after the prisoner has elected to be tried by a jury, he can at any time before trial re-elect after the grand jury has found a true bill, and be tried without a jury. As the law originally stood, if the prisoner was out on bail, he had no power to elect before a County Court Judge, but this has been remedied by the statute, and the march of legislation has been towards giving all prisoners the right to elect to be tried without a jury.

The third sub-section of sec. 825 declares that the trial without a jury shall be had "out of the regular term or sittings of the Court, and whether the Court before which, but for such consent, the said person would be triable for the offence charged, or the grand jury thereof is, or is not, then in session." And it certainly seems to me that, if he can be tried under those circumstances and on that occasion, he could elect also at that time. It surely cannot be read to mean that he cannot elect while the Court is in session, but may be tried while the Court is in session. It certainly would seem to me that the legislature intended to allow every accused person the chance of the grand jury finding no bill, and to give him a right of trial without a jury in case the grand jury found a true bill.

Of course, if the accused person pleaded to the indictment it might well be said that he has elected his forum, and cannot now elect to be tried without a jury, unless perhaps as provided for in sec. 828. If this matter had not heretofore come up for decision, I think I should have no hesitation in saying that in this case the prisoner had a right upon his surrendering, so as to be in custody awaiting trial, to elect to be tried without a jury, although the grand jury had found a true bill. This is the view taken by Mr. Tremeear in 10 Can. Crim. Cas., pp. 290-1. The only doubt I have upon this question is occasioned by a judgment given by the late Mr. Justice Wurtele in the case of The King v. Komiensky, 6 Can. Crim. Cas. 524. In that case the prisoner had not elected in any way before the County Court Judge. The grand jury found a true bill, and he pleaded to the indictment. After this plea the prisoner edeavoured to assert, and did assert, his right to re-elect under the section corresponding with sec. 828 of the Code. The learned Judge held that that section

of the Code did not apply, because, as the prisoner had never elected before the County Court Judge, but wished to go before him to elect, he was, therefore, not entitled under sec. 828, which gives only the power of re-election. These facts in that case are not at all parallel to the case at bar, but in giving his judgment the learned Judge seemed in the clearest language to lay down the law that where a grand jury had found a bill the prisoner had no right thereafter to elect before a County Court Judge. It may be argued that in that case the prisoner was either entitled to relief under sec. 828 or under sec. 825. Under the former section he is given the right to elect at any time before trial. It does seem to me that "trial" does not include plea. Frequently a prisoner pleads at one session of the Court and is not tried until the next session. And it can scarcely be said that the plea is the commencement of the trial. Sub-section 2 of sec. 828 gives a right to re-election "at any time before such trial has commenced." It seems to me then that if the prisoner has elected to be tried by a jury and the grand jury have found a true bill and he has pleaded to that indictment, still under sec. 828 he would have a right to re-election. But, although that right is given under sec. 828, it seems to me it might still be held under sec. 825 that if the prisoner has not elected in any way, but has pleaded to an indictment, he has elected his forum, and cannot afterwards elect, and this seems to be the view taken by McColl, C.J., in The Queen v. Lawrence, 1 Can. Crim. Cas. 295. If that is the right view of the law, then the last mentioned case, it seems to me, was properly decided. The prisoner had no right to re-elect under sec. 828, because he had never elected, and he had no right to elect under sec. 825 because he had pleaded. Looking at the law in that way, it seems to me I can reconcile that case with my present decision.

I, therefore, conclude that the prisoners have a right to elect before the County Court Judge as they did. I think the proper course to be followed is to adjourn the arraignment of the prisoners upon this indictment until the next session of this Court, and then the Crown can enter a stay of proceedings, if the case has been disposed of by the County Court Judge, or the prisoners may plead the facts of their trial.

MANITOBA.

MATHERS, J. APRIL 10TH, 1908.

CHAMBERS.

RE GREAT PRAIRIE INVESTMENT CO.

Company — Winding-up — Voluntary Liquidation under Manitoba Winding-up Act—Application by Liquidators for Direction as to Proceeding against Directors—Misappropriation of Funds of Company—Fraud — Rights of Minority of Shareholders—No Jurisdiction in Court to give Direction—Status of Liquidators—Costs.

Application by the liquidators appointed in a winding-up for a direction as to whether or not proceedings should be taken against former directors.

T. R. Ferguson, for liquidators.

A. E. Hoskin, for shareholders.

MATHERS, J.:—The company are in process of voluntary winding-up under the Manitoba Winding-up Act. Some time ago, on an application made to me by some of the shareholders, I removed from office the liquidators appointed by the shareholders and appointed the Standard Trust Company in their stead.

The present liquidators now apply under sec. 23 of the Winding-up Act for a direction as to whether or not they should take proceedings against a number of former directors of the company to cancel certain shares in the capital stock of the company which they issued to themselves as fully paid up, without payment of any kind, and to recover the dividends which they afterwards paid to themselves thereon. The auditors' report shews that the total stock issued was $78,250; that of this amount the directors distributed amongst themselves as bonus or promotion stock $38,035. The balance is made up of $28,370 paid for in cash by bona fide subscribers; $11,260 issued in respect of purchase price of the company; $185 issued in respect of commission; and $530 arrears. It is alleged that these directors, without sanction, concurrence, or knowledge of the shareholders who had paid for their stock in cash, secretly appropriated to

themselves nearly half of the total stock issued without consideration, and that they have since paid to themselves dividends thereon to the amount of 165 per cent. If these allegations be true, they have in their possession over $62,000 of the company's money. The transaction, as alleged, is on its face glaringly fraudulent, and I have no hesitation in saying that the liquidators will not have discharged their whole duty to the company until they have taken the appropriate proceedings to recover this money. The question of whether or not the liquidators will do so they must, however, decide for themselves. As liquidators in a voluntary winding-up proceeding they are not officers of the Court, or under its control, except to the extent stated in sub-sec. (f) of sec. 19. I d not think this is a "question arising in the matter of the winding-up" for the determination of which an application may be made to the Court under sec. 23. If the liquidators are of opinion that it would be for the benefit of the company to take proceedings to recover this money, I have no doubt it is their clear duty to do so.

I was pressed to direct the liquidators to call a meeting of the company for the purpose of obtaining a vote of the shareholders as to whether or not such proceedings should be taken. It appears that since the removal of the liquidators appointed by the company, the persons accused of wrong-doing have been prosecuting an active canvass for support, and that they now control by a considerable majority the bona fide shares. It may be taken for granted, therefore, that the wrong-doers would be able to control the meeting and vote down any resolution in favour of bringing an action against themselves. The liquidators, however, represent the minority as well as the majority. The minority have rights which it is the liquidators' duty to protect, even against the will of those in control of the majority. It was pointed out that by sec. 24 any member of the company may be permitted to take proceedings at his own expense in the name of the liquidator or company, should the liquidator refuse to do so, upon such terms as to indemnity to the liquidator as the Court may prescribe. As a pre-requisite to action by such member the liquidator must refuse, clearly implying the liquidator's right to take such action if he sees fit. In this case the money belongs to the company, and in it the right of action to recover it is also vested. I understand the liquidators do not refuse to take action in this case. If they did, I think the Court would have jurisdiction under sub-sec. (f) of sec. 19 to com-

pel them to do so. Under the circumstances, there is no order that I can make, but, as I think the application was not unreasonably made, costs of both sides may be paid out of the funds.

MANITOBA.

MATHERS, J. APRIL 15TH, 1908.

TRIAL.

PULKRABEK v. RURAL MUNICIPALITY OF RUSSELL.

Highway—Purchase of Land for, by Municipal Corporation —Dedication — Evidence of — Land Becoming Vested in Crown — Rights of Subsequent Purchaser for Value without Notice—Registry Laws—By-law.

Action to have a deed removed from the registry, as a cloud upon the plaintiff's title.

MATHERS, J.:—In 1897 the defendants purchased from one Boulton a portion of the south-east quarter of section 13 in township 20 and range 29 west of the principal meridian, consisting of a strip of 22 yards wide across the western side of said quarter section from north to south, parallel to and distant 40 yards from the western boundary thereof. The conveyance is dated 3rd May, 1897, and recites that the municipality are desirous of obtaining the land thereinafter described for the purpose of a roadway for public use.

The council of the defendants began negotiating early in 1895 with the object of securing a public road across Boulton's land and the adjoining land to the north, in lieu of the statutory road allowance between sections 13 and 14. Some time during 1895 an agreement was arrived at between Boulton and the defendants, and during the summer of that year the defendants caused the proposed road allowance to be partly cleared of scrub across the entire section 13, and the public at once began to use it as a highway, and have so used it continuously since that time. In 1896 several of the adjoining farmers were permitted by the defendants to perform their statute labour in clearing out the scrub to a greater width, to prevent the accumulation of snow during the winter

time, and in grading the road through a couple of marshy places.

The defendants paid to Boulton at the time of the execution of the deed by him to them the sum of $56.50, and in 1899 the defendants paid a further sum of $75 to one Spencer for work done in improving the road through the north-west quarter of 13.

This roadway constituted the principal highway between the villages of Millwood and Russell, and from the beginning there appears to have been a considerable traffic over it. One witness says it was as much travelled as any road in that section of the country.

On 27th May, 1899, the council of the defendant municipality passed a by-law, the first section of which relating to the land in question is as follows:—

"1. That portion of the east half of said section 13 which is in the next paragraph hereof described, is hereby established as a public road and highway, and is hereby dedicated for public use as such."

This by-law was not registered in the registry office for the district in which the land is situate under sec. 699 of the Municipal Act.

In November, 1903, Boulton sold and conveyed the south-east quarter of 13 to the plaintiff without making any reservation of the portion previously conveyed to the defendants, and the plaintiff's conveyance was duly registered on 12th October, 1904.

The defendants' deed from Boulton was not registered until 25th June, 1906.

The plaintiff bought the land bona fide, without any notice of the defendants' deed, and without actual notice of the road in question.

This action is brought to have the defendants' deed removed from the registry as a cloud upon the plaintiff's title.

The evidence of an intention on the part of the defendants to dedicate the strip of land in question to the use of the public as a highway is practically conclusive. The purchase of it for that purpose, the clearing it of scrub, and grading the low places so as to make it passable for traffic, the by-law passed establishing it as a public road and dedicating it for the public use as such, and the sanctioning the use of it as a highway by the public, without interruption for 12 years, leaves no doubt as to the intention of the defendants that this land should form a public highway.

Section 662 of the Municipal Act provides that, "unless otherwise provided for, the soil and freehold of every public highway or road altered, amended, or laid out according to law, shall be vested in His Majesty, His heirs and successors, for the use of the province of Manitoba."

The deed from Boulton vested the title in the defendants; but the moment the defendants dedicated it to the public as a highway, it became, by virtue of this section, vested in the Crown. The plaintiff did not obtain her deed until 2nd November, 1903. At that time the title to this roadway had been completely vested in His Majesty for several years. The provisions of the Registry Act do not apply to the Crown: see the Manitoba Interpretation Act, sec. 8, sub-sec. (YY); so that His Majesty's title could not be affected by any of its provisions. The plaintiff acquired no advantage as against the Crown by prior registration of her conveyance, and has consequently no title to complain of the subsequent registration of the defendants' deed.

While the conclusion at which I have arrived is fully borne out by the evidence, the allegations in the defence are not. There should, however, be leave to amend as the evidence warrants.

Upon making the necessary amendments to the defence, the action will be dismissed; but, under the circumstances, there will be no costs.

MANITOBA.

MATHERS, J. APRIL 15TH, 1908.

CHAMBERS.

EMPEROR OF RUSSIA v. PROSPOURIAKOFF.

Service of Papers—Statement of Claim—Substituted Service—Rule 201—Personal Service on Foreigners in Jurisdiction—Affidavits—Admission of Solicitor—Defendants out of Jurisdiction — Domicile or Residence — Temporary Residence in Jurisdiction — Rule 183 — Service out of Jurisdiction.

Application by defendants to set aside an order of the Referee allowing substituted service of the statement of claim and to set aside service made thereunder.

E. R. Levinson, for defendants.

H. P. Blackwood, for plaintiff.

MATHERS, J.:—This is an application to set aside an order of the Referee allowing substitutional service of the statement of claim and the service made thereunder. The order was granted upon an affidavit of Mr. Blackwood, one of the solicitors for the plaintiff, relating a conversation which he had with Mr. Levinson, solicitor for the defendants, in which it is alleged the latter admitted that the defendants were in Manitoba, but refused to give their address; and an affidavit of one Grandberry, in which he relates efforts made to serve the defendants, and deposes to a belief that the statement of claim and attaching order have come to their knowledge and that they wilfully evade service, and have absconded or are lying concealed within Manitoba to evade service. The affidavit contains a number of other statements, to which it is not at present necessary to refer.

A previous affidavit made by the same person on 28th February, for the purpose of supporting an order for attachment, in which the deponent swore that he had reason to believe and did believe that the defendants had absconded from Manitoba for the purpose of defrauding their creditors, was not produced to the Referee. The ground on which the order is moved against is that the action is not one coming within Rule 201, and the statement of claim cannot, therefore, be served personally, and, a fortiori, it cannot be served substitutionally, within the jurisdiction.

While Grandberry does not swear that the defendants are now in Manitoba, he suggests that they may be within the jurisdiction, but gives no reason why his positive belief previously sworn to has become modified, and none appears. It is, perhaps, needless to say that very little reliance can be placed on the affidavit of a man whose conscience apparently so easily accommodates itself to the exigencies of the case.

Levison knew at the time that the statements he is alleged to

As to Mr. Blackwood's affidavit, it does not appear that Mr. have made were to be incorporated in an affidavit and used against his clients. I venture to think no conversation would have taken place at all had he suspected the use that was to be made of it. It is in the interests of the public who conduct their business through members of the legal profession that the intercourse between solicitors should be free—a thing that would be impossible if every chance remark made

in, perhaps, a casual conversation was to be embodied in an affidavit and used as an admission against the client of the solicitor who made it. It is a practice which has not hitherto prevailed in this province, and one that I feel warranted in saying will receive no encouragement from the members of this Court. There may be occasions when an admission made by a solicitor may properly be used against his client, but it should first affirmatively appear that the admission was made under circumstances entitling the party to whom it was made to use it. Without attempting to be more explicit or to prescribe any code of ethics for the regulation of the conduct of solicitors in such matters, it is sufficient to say that it does not appear that this alleged admission was obtained in a way that would justify its use. I do not wish to be understood as implying that in making the affidavit Mr. Blackwood was guilty of any impropriety. All I desire to say is that he has not made it appear that the circumstances were such as to make it proper to use the admission as evidence against the defendants.

At the time the action was brought the defendants were and still are out of the jurisdiction. The action does not come within any of the sub-rules of Rule 201, and the statement of claim could not, therefore, have been personally served on the defendants at the time it was issued, or at the time the order for substitutional service was made. It does not come within sub-rule (a), because the whole subject matter is not land situate in Manitoba. It was argued that it came within sub-rule (c), because relief is sought against persons "domiciled, or ordinarily resident within Manitoba." It is abundantly clear, on the plaintiff's own shewing, that the defendants have never been domiciled in Manitoba. It follows that it was not their intention to reside permanently or for an indefinite period here. If such had been their intention, they would have acquired a domicile in Manitoba, because as a fact they did reside for a time in Winnipeg, and domicile is acquired by actual residence, coupled with an intention to make it permanent, or at least for an indefinite period. The facts then as they appear are that the defendants, having for a time resided in Winnipeg, but not with the intention of making it their home permanently, or even for an indefinite period, left the province of Manitoba more than a month before the action was brought, and have not since returned. A statement said to have been made on 3rd January last by a man apparently occupying the position of care-

taker of the house where the defendants had resided, to the effect that the defendants would return the then following week, is deposed to. More than 3 months have elapsed and the defendants have not returned, and a subsequent visit of the same affiant to the house disclosed the fact that it was apparently unoccupied. On these facts it does not seem to me possible to hold that the defendants are "'ordinarily resident within Manitoba." To be "ordinarily resident" in a place where a person has not acquired a domicile, he must be habitually physically present in that place: Dicey on Domicile, p. 76. I see nothing in the material to indicate the slightest intention on the part of the defendants to ever return to Manitoba. I cannot, therefore, hold that they come within sub-rule (c).

The principle is well established that if a statement of claim cannot be served personally at the time it is issued, it cannot be served substitutionally: Field v. Bennett, 3 Times L. R.; Fry v. Moore, 23 Q. B. D. 395; Welding v. Bean, [1891] 1 Q. B. 100.

In this case the statement of claim could not be served personally at the time it was issued, or when the order moved against was made, because the defendants were then out of the jurisdiction of this Court, and the cause of action is not one of those mentioned in Rule 201.

Rule 183 does not help the plaintiff. It gives wide power to order substituted service, but does not go the length of enabling substituted service to be made in a case where the service, as a matter of law, could not be made personally.

The plaintiff is not without remedy. By amending his statement of claim so as to bring it within the Rule permitting personal service out of the jurisdiction he would become entitled to an order for substitutional service under Rule 183: Western v. Buckledge, [1905] 2 Ch. 472.

As the matter stands, there is no alternative but to set aside the order for substituted service and the service made thereunder, with costs to the defendants in any event.

BRITISH COLUMBIA.

MARTIN, J. FEBRUARY 1ST, 1905.

TRIAL.

FOLLIS v. SCHAAKE MACHINE WORKS LIMITED.

Master and Servant — Injury to and Death of Servant — Failure of Action at Common Law and under Employers Liability Act—Successful Claim under Workmen's Compensation Act—Costs—Provisions of sec. 2, sub-sec. 4—Deduction of Costs Incurred by Action being Brought instead of Proceeding under Act—Method of Application —Set-off—" Good Cause."

Action for compensation or damages for the death of a workman in the employment of defendants, caused, as alleged, by the negligence of defendants.

G. E. Martin, for plaintiff.
J. Martin, K.C., and W. G. E. McQuarrie, for defendants.

MARTIN, J.:—On the evidence I am satisfied that the deceased's parents, who live in Ireland, were, at the time of his death, wholly dependent upon his earnings, and, therefore, since those earnings exceeded $500 per annum "during the 3 years next preceding the injury," the amount of compensation is fixed by the Workmen's Compensation Act, 1902, first schedule, sec. 1, sub-sec. 1 (a), at $1,500: Re Varesick and British Columbia Copper Co., 12 B. C. R. 286, 5 W. L. R. 56.

Then as to the costs. The action failed at common law and under the Employers Liability Act, and therefore was dismissed. But sec. 2, sub-sec. 4, of the Workmen's Compensation Act, supra, provides: "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such

compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing this action, instead of proceeding under this Act. In any proceeding under this subsection, when the Court assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act."

Under that section I proceeded, at the plaintiff's request, to assess compensation as above, at $1,500, but from this sum I am at liberty to deduct all the costs which, in my judgment, have been caused by the plaintiff bringing this action instead of proceeding under said Act. That sum is the difference between the said two courses of procedure, and can only be ascertained by the taxing officer in the usual way as hereinafter mentioned. To escape this result the plaintiff's solicitor submits that he was compelled to bring the action, for the alleged reason that otherwise he would not have been able to obtain the evidence of the parents, because the Rules of 1904, under the Act, make no provision for issuing a commission to take evidence abroad, and asks me, in my discretion, to grant him certain costs under sec. 6 of the second schedule, which provides that " the costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator," etc. . . . But, first, in my opinion, that section has no application to the special case of particular powers being conferred upon a Judge of this Court sitting in the ordinary way in the trial of an action, and who was and is not an arbitrator. See Cattermole v. Atlantic Transport Co., [1902] 1 K. B. 204, which decides that the assessment of the compensation is a proceeding in the action. And, second, I am unable to take the view that the arbitrator has not got the power to direct evidence to be taken by commission. Section 3 of the second schedule and Rules 2, 34, and 81 point to the opposite conclusion.

The working out of the section has been considered in the Cattermole case, supra, and the practical way to ascertain the said difference in costs is that, since the costs of the abortive action must follow the event under Supreme Court Rule 976, unless for "good cause" to the contrary (and there is none such in this case), the successful defendant is entitled to have them taxed in the ordinary way, as pointed out in Beven on Employers Liability and Workmen's Compensation

(1899), p. 241. Then the plaintiff is entitled to such costs as would have been occasioned by proceedings brought in the ordinary way under the Workmen's Compensation Act, which will be set off against or deducted from those of the defendants, and the balance, which presumably in this case will be in favour of the defendants, will, after the Registrar has reported to me the result of said proceedings (which are hereby referred to him for that purpose) be deducted from the plaintiff's compensation, and the necessary certificate given.

I note that, apart from the "good cause" above mentioned, the words "shall be at liberty to deduct" give a discretion to the Judge, in a proper case, to refuse to make the deduction. And it is pointed out by Beven, and by Minton-Senhouse, in Accidents to Workmen (1902), p. 134, that where the compensation is payable in instalments the deduction must be made correspondngly. See also, generally, on the section in question, Dawbarn on Employers' Liability (1907), pp. 116, 215. 280, 326, and 463, form 44.

It is further to be observed that in England the Workmen's Compensation Act, 1906, sec. 1, sub-sec. (4), has changed the wording to "all or part of the costs," etc.

BRITISH COLUMBIA.

LAMPMAN, Co. C.J. FEBRUARY 12TH, 1908.

COUNTY COURT OF VICTORIA.

HUTCHISON BROTHERS & CO. LIMITED v. PERKINS.

Contract—Sale of Engine—Price of Work Done in Connecting with Machine—Whether Included in Contract Price—Evidence—Estoppel—Costs.

Action to recover the balance of the price of an engine sold by plaintiffs to defendants, and the price of work and material done and supplied in connecting the engine with a well-digging machine.

Langley, for plaintiffs.

Aikman, for defendants.

LAMPMAN, Co.C.J.:—The defendant Perkins, who by trade is a gunsmith, but who is now engaged in farming, and the defendant North, who is an advertising agent, formed a partnership for the purpose of carrying on a well-digging business. They had ordered the drilling machine, and were desirous of getting an engine to run the drilling machine, and Perkins made inquiries in Tacoma and saw an engine that he thought would suit, and he then came back to Victoria, and he and North went to the plaintiffs and saw D. C. Hutchison of the plaintiff company; they explained to Hutchison the kind of engine they wanted, and he shewed them a cut of one in a catalogue quoted at $125 without accessories; they told him the purpose for which they wanted it, and that they did not want to go over $250, as that sum was about the limit of their money, or words to that effect. There is no dispute about the fact that they all talked about an engine all complete as being the subject of their bargaining, but the defendants go further and say that they said they wanted an engine all complete and connected with or put on to their well-digging machine. The price agreed on was $250, and, after the engine came, the defendants took the well-digging machine, which is a pretty formidable looking affair, on a four-wheeled truck, to the plaintiffs' shop to have the necessary connections made, so that when the engine was started up it would run the well-digger. The plaintiffs did the connecting, and seek to charge for the work $130, and it is about this charge that the dispute arises; the plaintiffs say they did not include for the connecting in the price of $250 quoted, and the defendants say they did.

As a general proposition, a charge of $130 for connecting the $250 engine does seem out of proportion, but of course each case must depend on its own circumstances. I think the plaintiffs are honest in saying they never expected that to make the connections was a part of their contract, and I also think the defendants are equally honest in saying they never expected to have to pay anything extra for the connection.

A great deal of contention took place as to what were the exact words of description of the engine, the plaintiffs relying on the description of an engine all complete as being one that did not contemplate any connections. If no other words of description had been used, I

agree with the plaintiffs, but I think that the defendants did ask for something more than the engine with its accessories; they told Hutchison what they wanted the engine for, and also told him the amount of money they had, and I think he should have understood from them that they expected the engine to be connected with the well-digger without extra charge. As being inconsistent with the defendants' contention, it is urged against them that after action they agreed to settle, that they have no objection to paying a fair charge for the woodwork necessary to the connecting, and that, while connections were being made, Perkins said he did not see why they were putting in brass pipes, as they were so expensive.

As to the willingness to settle. There is no dispute that the defendants always objected to the charge for making the connections, but of course after the action was commenced they had to fight it or settle it. North was not in favour of settling, but Perkins was, because, as he says, his heart was weak and he dreaded going to Court: he says he used to suffer from fits, and he was afraid of a recurrence of them if he was worried with a law-suit, and the ordeal of the witness box; so out of deference to his desires North went with him and made some offers of settlement.

As to the woodwork. I don't think the defendants were legally bound to pay for this: it is a part of the connection, but, after seeing it, I am not at all surprised that the defendants always expected to have to pay for it, as they may have very well thought that it was something the plaintiffs never contemplated having to do.

As to the pipes. Mr. Langley endeavoured to construe Perkins's remark as being a complaint against the course of the plaintiffs in supplying such expensive pipes, as they (the defendants) would have to pay for them. Perkins did not say so, and I cannot draw any such inference from what he did say. He was watching the work being done, and, when he saw brass piping being put in, he simply remarked that he did not see why they were putting in such xpensive ones. If the engine had been a gold one he would probably have made a similar remark, but could any one suppose that he was complaining?

The plaintiffs depend on special instructions from defendants to do the connecting, but I do not find that any were given, and, as the defendants thought the work was part of the contract, they will not have to pay for it, although they stood by and saw it being done.

The defendants paid into Court $100, being balance due on the price of $250, $16 to cover cost of engine seating or woodwork, $1.75 for gasoline, making a total of $117.75, with $9.25 costs of plaint, etc., and in doing so I think they paid all the plaintiffs were entitled to.

As to the costs of judgment which was set aside. After service of the summons both defendants saw Hutchison re settlement, and amongst the terms agreed on was one that the engine should be returned to plaintiffs. Hutchison says it was to be returned within a week, but both Perkins and North say no definite time was agreed on; North gave Hutchison a note which Hutchison says he tore up in presence of North and Perkins, but this both North and Perkins deny. North says he saw Hutchison at intervals and told him they would bring the engine in soon and leave it at E. G. Prior & Co.'s warehouse, but this was not done until after judgment was signed. I can see no reason for defendants' delay in bringing the engine in, other than that they did not think it was necessary to bring it in at once, and I think, if the week's time had been agreed on, it would have been returned within the week. Until I saw the engine and machine I must confess I could not understand why the engine was not returned to the plaintiffs, although North insisted that the arrangement was to leave it at E. G. Prior & Co.'s warehouse. The engine is seated on woodwork on the well-digger, and is a very small part of the whole thing, and, besides, it is fastened to the digger, and the defendants have removed from my mind the impression I first had that it was unreasonable and unbusinesslike to leave the engine at any place other than the plaintiffs'.

BRITISH COLUMBIA.

FEBRUARY 25TH, 1908.

FULL COURT.

RE NAKANE.
RE OKASAKE.

Constitutional Law — British Columbia Immigration Act, 1908—Ultra Vires—Immigration Legislation—Field Occupied by Dominion Parliament—Treaty with Japan.

Appeal by the Attorney-General for British Columbia from orders of HUNTER, C.J., on the return of writs of

habeas corpus, directing the discharge of two Japanese who were detained under a warrant of commitment given under the provisions of the British Columbia Immigration Act, 1908.

The appeal was heard by IRVING, MORRISON, and CLEMENT, JJ.

R. Cassidy, K.C., for the Attorney-General.

D. G. Macdonell and E. W. Jones, for the respondents.

IRVING, J.:—The Chief Justice came to the conclusion that the Immigration Act, 1908, was not applicable to the subjects of the Emperor of Japan.

The Act is founded on powers conferred by sec. 95 of the B. N. A. Act, upon the provincial legislature. By that section it is declared as follows: "In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

It is to be observed that under sec. 95 the legislation of the province shall have effect in a province "so long and as far only as it is not repugnant to any Act of the Parliament of Canada."

By a statute, assented to on 30th January, 1907, intituled "An Act respecting a certain Treaty between Canada and Japan," it is recited that a convention was signed between the United Kingdom and Japan concerning commercial relations between Canada and Japan, and subsequently ratifications of the said convention were exchanged. It then declared that the convention, which is set forth in the schedule to the Act, was thereby sanctioned.

By article (1) of the treaty referred to in the convention, it is provided that "the subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the dominions and possessions of the other contracting party." On behalf of the province it is said that this Act, to which I have referred, is not an Act or a statute at all, and that the Dominion government, even

if they had power to sanction or give effect to this treaty, have not done so. With regard to their power to give effect to the treaty, the answer is to be found in the 132nd section of the B. N. A. Act as follows: "132. The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

Then the question remains, has the Imperial government in the Act given effect to the treaty? The language is: "The convention, etc., set forth in the schedule is hereby sanctioned." That seems to be a very apt and proper way of giving effect in Canada to all the terms of the treaty. Without an Act giving effect to the treaty, there would be no binding law governing the officials of this country. The word "sanction," which is derived from the Latin "sanctus," "sacred," signifies to ratify a decree or ordinance—in an extended sense to make anything binding. In itself, it conveys the idea of authority by the person sanctioning. It is the lending of a name, an authority, or an influence in order to strengthen and confirm a thing. It may not be out of place to give the following quotation where it is used by Addison: "Men of the greatest sense are always diffident of their private judgment until it receives a sanction from the public."

That Act, I think, is a complete answer to the present appeal. It is not possible that there can be two legislative bodies having equal jurisdiction in this matter, and where the Dominion Parliament has entered the field of legislation, they occupy it to the exclusion of provincial legislation.

I would dismiss the appeal.

MORRISON, J.:—The only point seriously argued before us is whether 6 & 7 Edw. VII. ch. 50, intituled "An Act respecting a certain Treaty between Canada and Japan," which purports to sanction the convention between the United Kingdom and Japan respecting commercial relations between Canada and Japan, has given its provisions the force and effect of a law of Canada.

Mr. Cassidy seems to me to have taken much higher ground than the nature and circumstances of this case justify. If the convention in question were a high treaty, dealing with the more grave and important political and

diplomatic questions which sometimes concern nations, his forceful and ingenious argument would be quite appropriate.

The Anglo-Japanese convention, however, is a convention treaty dealing with a subordinate question, wherein the high contracting parties are bound to observe the stipulations contained in the treaty, and, as those stipulations are respecting Canada's commercial relations with Japan, the obligation is imposed upon Canada to take legislative action, which obligation was discharged by the enactment above referred to, without which sanction the Courts of this country could not enforce the provisions of the treaty.

The provisions of the treaty affect the whole of Canada, as well as the whole of Japan, and both parties thereto contemplated uniformity in their enforcement.

Therefore, the provisions of this treaty, thus sanctioned by Canada, being in harmony with the existing federal enactments respecting immigration, must be taken as a law of Canada touching immigration. That being so, is the British Columbia enactment, known as "The British Columbia Immigration Act, 1908," repugnant to it? In my opinion, it is, in every sense of the term. Although the subject of immigration, in some respects and for some purposes, falls within the jurisdiction of the provincial legislature, yet where there is already an enactment on the subject by the federal Parliament, it must be shewn that the provincial legislation is in furtherance or aid of the federal legislation. And in doing so, regard must be had to the character, nature, and scope of the federal enactment.

The exercise of the power given the federal Parliament by secs. 132 and 95 of the B. N. A. Act completely destroys any effect the provincial Act was intended to have, as far as the subjects of Japan are concerned.

I entirely agree with the learned Chief Justice upon this point, the only one adjudicated upon by him, and upon which this appeal arises.

CLEMENT, J.—I agree entirely with the learned Chief Justice and my brothers Irving and Morrison on the one real point of these appeals. To my mind, the case for the appellant Attorney-General is hopeless; so hopeless that I feel constrained to express my regret that it should ever have been thought proper to attempt to enforce the British Columbia Immigration Act, 1908, as against these respondents.

We live under a federal system of government. With regard to certain matters the Canadian people speak as a unit, while as to other matters we speak separately, and, if we choose, diversely, by provinces. The system was brought to birth only after long travail. The minds of our best men were long occupied in fixing upon the proper line of division between matters of general or Canadian concern and matters of more immediately local or provincial concern, and the result of their labours, as embodied in the British North America Act, should be loyally recognized and respected. No doubt, honest differences of opinion may exist in many cases as to where the line is drawn by that Act, or as to the question on which side of the line a particular matter should properly fall. But to suggest doubt where no real doubt exists, and particularly as to matters apt to inflame, is not, in my judgment, to be commended. Such a matter we have here. This matter of Japanese immigration has been dealt with properly, that is to say, constitutionally, by the Parliament of Canada; and I must say that, to my mind, it smacks strongly of disloyalty to our settled form of government when the authorities of one province undertake to override and render abortive the will of the people of Canada—et quorum pars magna sumus—constitutionally expressed in an Act of the Parliament of Canada; and when they even make bold to forbid the honourable observance of our solemn engagements with a foreign power.

I should perhaps add that I express no opinion as to the effect, each upon the other, of the Japanese Treaty Act and the Dominion Immigration Act.

I would dismiss the appeal with costs.

BRITISH COLUMBIA.

FEBRUARY 25TH, 1908.

FULL COURT.

SCOTT v. MILNE.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments—Default—Time of Essence—Rescission — Waiver—Equity — Attornment Clause—Notice of Rescission—Agent of Purchaser—Return of Money Paid.

Appeal by plaintiff from the judgment at the trial dismissing the action, which was brought by purchaser against

vendor for specific performance of an agreement for sale of land.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

L. G. McPhillips, K.C., for plaintiff.

Bird, for defendant.

HUNTER, C.J.:—Action for specific performance of an agreement for sale of land by the purchaser against the vendor. The price was $650, $100 down, and the balance in $50 instalments, payable at the office of Dow, Fraser, & Co., Vancouver, quarterly, on 10th May, 1906, and thereafter until paid, with interest at 7 per cent.; arrears of overdue principal and interest to bear said rate of interest after as well as before maturity. Other provisions were: examination of title to be at the purchaser's expense; certificate of title to be conclusive evidence of title; purchaser to have possession until default; purchaser attorns and becomes tenant at will at a rent equivalent to the amount of the instalments of purchase money and interest on the due dates until final payment; power to enter and determine tenancy on default; covenant by purchaser to give up possession peaceably on default; covenant by purchaser to pay up arrears on demand; covenant by vendor not to determine tenancy so long as payments are punctual. The concluding clauses are as follows:—

"It is further agreed that any notice which may be given by the vendor to the purchaser under or in respect to these presents, may be given by handing same to the purchaser or by posting the same by prepaid post registered letter addressed to Mr. Israel Scott, Vancouver, B.C., and such notice shall be deemed to have been given on the day on which it is posted.

"And it is expressly agreed by and between the parties hereto that this agreement shall not be registered or recorded as a charge or otherwise against the said premises."

The payments were made up to and including that due on 10th August, 1906. The next (November) payment fell into arrear, and on 28th December Mrs. Milne, by her husband, requested payment of the amount, in a letter addressed to the plaintiff, Israel Scott, at Vancouver. No answer was received from Scott, who at this time was almost ubiquitous, having shifted from Elgin to Brandon and then to

Winnipeg. On 2nd February Mrs. Milne, who had moved to Victoria, telegraphed Dow, Fraser, & Co., who had prepared the agreement, and who were acting at this time as agents for Scott, asking for a cheque if the money had been paid; and, the money not coming to hand, Mrs. Milne notified Dow, Fraser, & Co., by letter dated 4th February, to instruct Scott that the agreement was cancelled. On 21st February the Grand View Land and Trust Co., the alter ego of Dow, Fraser, & Co., by Dow, wrote Mrs. Milne saying that they had a power of attorney from Scott, and tendering her their cheque for $115.20, being the amount of two overdue instalments and interest, which was promptly refused and returned by Mrs. Milne, on the ground that the agreement was at an end. I gather from a letter of 26th February from Dow to Scott that the latter had been duly apprised of the state of his affairs from time to time, and the former expresses regret that his letters had not been answered sooner, as a great deal of trouble would have been saved.

I think the learned Judge was right in concluding that there is nothing in the case to shew any equity to relief.

From the admissions of Dow it appears that Scott knew that Mrs. Milne held the property under an agreement for sale, on which her payments were periodically due about 10 days previous to Scott's payments to her, and this circumstance alone is sufficient to shew that the essence clause was no empty form, but in accordance with the express intention of the parties, and also shews the reason for its insertion. Mr. McPhillips argued that time should not be considered of the essence because of the provision for interest on arrears; but in the cases he cited there was no specific stipulation making time of the essence, and I adhere to what I said on this point in Peirson v. Canada Permanent Mortgage Corporation, 11 B. C. R. at p. 140, 1 W. L. R. 99. The case resolves itself, then, into the simple one of neglect to make provision for the payments, with the result that the vendor exercised her undoubted right to rescind after pressing for payment and waiting for nearly two months after her right to rescind arose, but without result.

Mr. McPhillips laid great stress on the presence of the attornment clause, and argued that, as this created the relation of landlord and tenant, he had the right to call on the Court for relief against forfeiture as for the non-payment of rent. No doubt, the power of the Court to relieve for non-

payment of rent is very extensive, and in many cases is ex debito justitiæ, as shewn in Newbold v. Bingham, 72 L. T. 852; but, in my view, that clause merely provides an ancillary private remedy, and is quite consistent with the express right of rescission provided by the agreement in case of default in payment. We must look at the circumstances surrounding the making of the agreement, which is on a common printed form, and it is plain that the rescission clause must have attracted the particular attention of the parties, as the number of days' default, in this case 30, had to be agreed upon and filled into the printed form.

Mr. McPhillips also argued that, as the notice clause provides that any notice may be given by handing the same to the purchaser, or by posting a letter addressed to Israel Scott, Vancouver, unless one of such modes was adopted, any notice to Scott was ineffectual. This is clearly untenable; the object of the clause is to protect the vendor and not to hamper him; it is enough if the purchaser has authentic information by any channel that the vendor has cancelled the agreement, and there can be no reasonable doubt that Scott knew through his agent that the vendor was pressing for payment, and, so far as I can see, nothing occurred, before the refusal to accept the cheque, to raise any equity in his favour.

I would dismiss the appeal.

MORRISON, J.:—The defendant, Mrs. Milne, in her agreement with the plaintiff stipulated, by apt and express words, that time should be of the essence of the contract. From the evidence before us, I am of opinion that it was essential to Mrs. Milne that the instalments should be promptly paid, for she had arranged the dates of payment to synchronize with dates of payments which were accruing due from her to another party, to meet which she relied upon the instalments from the plaintiff.

That being so, I think the term as to time being of the essence of the bargain went to the root of the contract.

But it is contended that there was an extension or waiver of this stipulated time.

How can the plaintiff take advantage of his own delay in making the payment in question? He made no request for an extension. The defendant did nothing to justify him, assuming he was to get any extension. He left the jurisdiction without making any provision for the payment upon

the due date. All Mr. Milne did was to exhibit solicitude for the payment, and, when satisfied it was not forthcoming, proceeded to enforce her rights, which arose automatically under the agreement upon plaintiff's default. This delay was entirely for the convenience and benefit of the plaintiff. The property was acquired for speculative purposes. This was in mind of both parties when the contract was made. Notice of the rescission was given in the most effective manner available at the time, viz., to Messrs. Dow, Fraser, & Co., who were in communication with the plaintiff. There does not appear to be anything that happened to create an equity in plaintiff's favour. The defendant did nothing to lead the plaintiff into the belief that her rights would not be strictly enforced. Further, there is no evidence to shew it would be inequitable to enforce them: Morton v. Nicholls, 12 B. C. R. at p. 488, and cases there cited.

To hold that this essential term of the contract was varied, it must be shewn that it was so varied by both parties as explicitly as it was made. It seems to me that, if effect is given to the contention of plaintiff's counsel, we should be making a new contract between the parties.

Upon comparing the cases cited by plaintiff's counsel with the present case, it will be seen that the nature of the subject matter of the contracts there was essentially different. Some of them are collected in Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 334. Lord Blackburn in that case says: "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct.'"

I think the judgment of the trial Judge is right, particularly so since no peculiar or in fact any hardship follows, inasmuch as the plaintiff gets thereby a return of his deposits already made.

IRVING, J., concurred.

BRITISH COLUMBIA.

FEBRUARY 26TH, 1908.

FULL COURT.

BRIDGMAN v. HEPBURN.

Principal and Agent—Agent's Commission on Sale of Land —Employment of Agent to Find Purchaser at Named Figure—Introduction of Purchaser—Subsequent Sale at Lower Figure.

Appeal by plaintiff from the judgment at the trial dismissing an action for commission on the sale of land.

The appeal was heard by HUNTER, C.J., MORRISON, J., CLEMENT, J.

E. V. Bodwell, K.C., for plaintiff.

A. P. Luxton, K.C., and Elliott, K.C., for defendant.

HUNTER, C.J.:—The facts in this appeal are simple and, for the most part, not in dispute.

On 23rd April last the defendant, being pressed by mortgagees, requested the plaintiff to procure a loan of $58,000 on 4 properties in the city of Victoria. The plaintiff introduced the matter in his office to Meredith, a capitalist, who said he did not wish to lend, but would go and look at the properties. On the way back they met Hepburn, to whom Meredith was introduced by the plaintiff, and they discussed an offer by Meredith to lend the money on certain terms, which offer, after consideration, was declined. A few days later, it transpiring that there was some defect in the title to one of the properties, tenders having been advertised for by the mortgagees, Hepburn suggested to Bridgman that he should try to get Meredith to purchase two of the properties, one known as "the Lighthouse Saloon" and the other as "the Prince of Wales Saloon," hereinafter referred to as "the saloons." The price named by Hepburn was $56,000, and, according to the plaintiff, he agreed to pay 3 per cent. commission. Meredith, however, would not give $56,000, but Bridgman says he thinks

he stated he would give $46,000. At any rate the sale was not put through at $56,000.

About this time Meredith, through his banker, had got into negotiation with Jones, the agent for the mortgagees; and these negotiations culminated in the purchase by him of the saloons for $50,000 from Hepburn, who paid Jones a commission.

There is no evidence to shew that Hepburn expressly agreed with Bridgman to pay a commission on any sale that might be effected with Meredith. All that appears is that Bridgman communicated a request for a loan, and an offer of sale at $56,000, in respect of which Hepburn agreed to pay a commission, both of which offers came to nothing.

Mr. Bodwell, however, contended that when Hepburn agreed to pay a 3 per cent. commission on $56,000, he thereby also agreed to pay a commission on any lesser sum at which the sale went through, and this although the final negotiations were completed through the other agent, Jones; and for this proposition he cited the following remarks credited to Lord Watson in Toulmin v. Miller, 58 L. T. N. S. 97: "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

This speech of Lord Watson is not to be found in the report of the case in the Law Reports; and it is evident from that report that the Lords decided the case on the ground that the Court of Appeal and Divisional Court were wrong in setting aside a verdict for the defendant, who resisted an agent's claim for a commission. The remarks of Lord Watson are therefore obiter dicta; but, even if they were not, I do not think that he intended to lay it down as an unvarying rule that where an intending vendor names a price and agrees to pay a commission on that price,

he ipso facto obligates himself to pay a commission on a lesser sum. It is in all cases a question of intention, and I quite concede that there might well be a case in which the Court could see from the circumstances surrounding the negotiations that it was the real intention of the parties that the agent should receive a commission, whatever the amount realized might be, and that the price given the agent was only a working basis, in other words, that the agreement was to pay in the event of sale, and not in the event of sale at a specified price.

But I deny the right of any Court to imply an obligation to pay in the event of a sale, when the only evidence before it is that of an obligation to pay in the event of a sale at a named price, as nothing would be better calculated to introduce doubt and insecurity into the law of contract. When prima facie, as here, the agreement is to pay a commission on a named figure, it is for the agent to shew in the clearest way that the real intention of the parties was that he should receive a commission on any figure at which the sale goes through. Therefore, in all cases, the agent will, if prudent, before he introduces his customer, have a clear understanding as to whether he is to get a commission on a named price or on the figure at which the sale goes through.

The above is sufficient to dispose of the appeal, but, assuming an agreement to pay on any figure at which the sale went through, there is another ground which, as at present advised, I think is also fatal to the plaintiff's case, although it is not necessary to come to a final conclusion. What was the contract? Was it to pay a commission for the introduction of the purchaser, or was it to pay a commission in the event of the sale going through by reason of the plaintiff persuading the purchaser to buy? Here, again, I think it is for the plaintiff to shew what the contract was, but the matter is left in doubt, as, according to Bridgman's own testimony, Hepburn said: "Why don't you get your man to purchase the other two properties?" While I admit that a jury might find either way, I must say that if it were left to me to find what the agreement was, I should be strongly inclined to think that the word "get" implied that the plaintiff was to be paid a commission only in the event of the purchaser being persuaded to buy through the efforts of the plaintiff; in other words, that he was not merely to find the man who ultimately pur-

chased, but that he was also, in real estate parlance, to work up the sale, and this especially as it is undeniable that Hepburn was at his wits' end for money, and was so to the knowledge of the plaintiff. If so, the plaintiff did not earn the commission, as, if he did not actually drop the matter after the refusal of the $56,000 offer, the sale was at any rate finally brought about by Jones.

I would dismiss the appeal.

CLEMENT, J.:—I think this appeal should be dismissed. I can see no good reason for disturbing the finding of fact of the trial Judge that the contract of employment here was in no sense general, viz., to find a purchaser, but was essentially particular, viz., to find a purchaser at a named figure. The plaintiff made the attempt and failed, and so cannot recover.

In this view, it is unnecessary to consider the question how far or in what sense the actual purchaser, Meredith, was procured by the plaintiff. On the evidence, however, I should say that while the plaintiff's original introduction to Meredith of the subject of the availability of the property in question as a good mortgage investment may possibly have been a causa sine qua non, it was clearly not the causa causans of the sale which afterwards was brought about by Jones.

MORRISON, J. (dissenting):—The defendant was the owner of certain properties in Victoria, over which the Finlayson estate held a mortgage, A. W. Jones being trustee and agent for the estate. This property was advertised for sale pursuant to the mortgage, payments having been long overdue, and the defendant, though urged, seemed unable to meet them. Whilst in this predicament, he went to the plaintiff, Bridgman, a real estate and financial agent, hoping to secure a loan to obviate the sacrifice of his properties under a mortgage sale. This proposition for a loan fell through, and very shortly after a sale was effected to one Meredith, who had been introduced to Hepburn, the defendant, by the plaintiff. It is in respect to the commission claimed upon that sale that the action was brought.

The dates material to the issue, as far as can be gathered from the evidence, are as follows:—

On 23rd April, 1907, the defendant instructed the plaintiff to negotiate a loan on all his incumbered properties for

$58,000. Bridgman thereupon sought out Meredith, a client of his, to whom Hepburn was introduced, and all 3 inspected the properties. Then Meredith, with a view of making arrangements for financing the proposition, which he was seriously considering, went to his banker, Mackenzie, who called up by telephone Messrs. Pooley, Luxton, & Pooley, solicitors for the Finlayson estate, and through them also communicated with Jones, the agent for the estate. It may be stated parenthetically that Jones was also carrying on the business of a real estate agent. From these interviews it was made clear to Meredith by Jones and the solicitors that the estate wanted the cash, and that without delay. The same evening Meredith went again to his banker, Hepburn accompanying him, but was not present at their interview, Meredith now being fortified with the knowledge that Hepburn was forced in regard to the disposal of his properties.

This all occurred on the 23rd, according to Meredith's evidence.

After the lapse of a few days, the matter of the loan fell through. In the meantime, Meredith had met Jones about the 25th or 26th of April, being introduced by Mackenzie, who seems to have been assisting Meredith in getting as advantageous terms as possible in his negotiations respecting the property. At no time from Bridgman's introduction does he relinquish the idea of acquiring an interest of some sort in those properties, as he says himself, where he could get it cheapest. Having ascertained, through Mackenzie, Jones's connection with the Finlayson estate, he began dealing with him, Hepburn being present on occasions. And during these negotiations with Jones, Hepburn went to Bridgman and asked him to try and get Meredith to buy, mentioning the price at $56,000. Now what took place between the plaintiff and defendant is the determining incident of the case.

Bridgman's evidence, pp. 7 and 8:—

"Q. Where did you see him again, and what was the occasion of that interview, and what took place?

"A. I met Mr. Hepburn in Bastion street.

"Q. About how long afterwards would that be?

"A. I cannot fix the date beyond that it was after the tenders had been opened. I met him at the corner of Langley and Bastion streets, and had a conversation with him, and he told me that there was a hitch in—with regard to the

sale of the property under the tenders, that there was some defect in his title to the Pither & Leiser building, that there were some deeds missing relating to the title to a portion of that property, a gore or slice of the property, to which the title deeds could not be found, and in consequence the tenderer had withdrawn his tender, or the person who was buying had withdrawn.

"Q. Then what else?

"A. And he said that he was being pressed by the Finlayson estate; and he asked me—he said, 'Why don't you get your man (referring to Meredith) to purchase the other two properties? . . .

"Q. He asked you if you could not get your man to buy these two pieces?

"A. Yes.

"Q. What was mentioned about them?

"A. He mentioned the price, said $56,000. And we discussed the question of commission. He said 'you must not be hard on the commission.' I said that I thought that 3 per cent. would be reasonable, and he agreed to 3 per cent. commission.

"Q. Agreed to a 3 per cent. commission?

"A. Yes.

"Q. What did you do in consequence of that conversation?

"A. I saw Mr. Meredith and put the matter before him; and he said he would not give $56,000 for the property, but he mentioned a figure, I don't remember exactly whether it was $46,000 or $48,000, I think $46,000, he said he would give for the property. And he went on to say that at any rate it would be necessary for him to see what financial arrangements could be made, and that he would go and see the trustee of the Finlayson estate.

"Q. (Interrupting). Who was the trustee of the Finlayson estate?

"A. Mr. A. W. Jones.

"Q. He said he would go and see A. W. Jones?

"A. Yes."

Hepburn's version can be gathered from pages 62 and 66:—

"A. Mr. Jones came to me and says, 'I can get you $50,000 for those two properties'—although I am getting a little ahead; you see the Grand Theatre in the meantime

was sold out of that property, there were 4 properties, and the Grand Theatre sold for $12,500; there was a commission of $500 on it, and $12,000 was paid in to the account of the Finlaysons, I think it was $11,800 was paid in; in fact, I am positive of it—for which I got credit on the mortgage. That left a balance of $46,200.

"Q. Go ahead?

"A. Now then, when the other two pieces of property—it had to be sold for to cover up the $46,000; and when Mr. Jones got me the offer of $50,000 from Mr. Meredith, which I did not know who made the offer or anything about that part of it, I never knew until after Mr. Jones had got authority from me to dispose of it; and when Mr. Jones told me that night, he says, 'my people are going away, and this thing has got to be fixed up to-night.' So I went straight from there to Mr. Bridgman for to see if he could not do something, and on my way down I ran across this man Meredith, and I went right straight from there to Mr. Bridgman's office and he was not in; I started to go down to Mr. Pooley & Luxton's office and I met him in Bastion square at the corner. I says to him, I says, 'if you can sell this property inside of two hours for $56,000,' I said, 'you can go ahead and do it, and I will allow you a commission on it of $1,500.'

"Mr. Elliott: Then what took place?

"A. I went into—I went back to Mr. Bridgman's office, and he said he couldn't do anything. I went from there to Mr. Jones, and the two of us went down to Luxton & Pooley's office, and I gave him authority to sell the property for the $50,000. . . .

"So as I looked upon it I was losing $20,000 or $30,000 by being compelled to take it, but I could not raise that money, do you see? So I goes to Mr. Bridgman's office twice the same day, the same afternoon, I went twice and could not find him in, and finally I was going down to Pooley & Luxton's to find out if there was a chance to raise this money in some other way, do you see; and on my way down I met Mr. Bridgman, and I said 'Mr. Bridgman, if you think for one moment that you can go and raise me $55,000 or $56,000 on that property' I said, 'you can have to this evening to do it . . which was only about an hour. Now, I says, 'this man Meredith'—I saw him standing on the corner of Government and Fort, right on the corner, and I told him, I says, 'You go over and see whether he

will not buy instead of . . ,' so he went in and shortly afterwards Mr. Bridgman told me, 'I am not able to do anything in such a short time.'

"Q. So that the man you told him to go and see on that occasion was Mr. Meredith?

"A. Yes, sir.

"Q. Now the only difference between you and Mr. Bridgman on that point is, that you fixed the date of the time that you closed with Mr. Jones, and he said this authority took place some time before that?

"A. Yes, well, it was the same evening.

"Q. How do you know it was the same evening-

"A. Because it was, I know it was the same evening.

"Q. How can you account for the fact that Mr. Bridgman was negotiating for this with Meredith, and for several thousand dollars higher? Do you admit you made the offer to him?

"A. No, sir.

"Q. Bridgman says you did?

"A. Bridgman, I don't think said anything of the kind.

"Q. He said it this morning, that you gave him that offer?

"A. I think he will tell you the same.

"Q. Didn't you hear Mr. Bridgman this morning?

"A. No.

"Q. Mr. Bridgman said you met him on the street and told him to go and make an offer of $56,000 to Meredith, and that he did, and that Meredith said he would not give that much, and they negotiated for several days about it, and finally you came into Mr. Bridgman's office and said, 'How is it that Meredith has thrown you over and is doing his business with Jones?' Now, apparently you have got mixed on the dates?

"A. I have not ot mixed on the dates at all.

"Q. You have no memorandum of dates at all, nothing to aid your memory by?

"A. We have got the books here, that shew what occurred.

"Q. But the books do not help us on this point. What memorandum have you got to convince you that this offer to Bridgman was on the day you went to Pooley & Luxton's office?

"A. It occurred on the same day, and within two hours, the whole transaction.

"Q. That is only a matter of recollection with you?

"A. That is all true."

As to the other parties, Meredith disavows any intention of having retained any agent. He was endeavouring to get the properties on the best terms to himself, and with that object he dealt with Jones qua agent for the Finlayson estate. He was not dealing with him as an independent real estate agent. He frankly admits that Bridgman was the medium through whom he was introduced to the defendant and his property.

The defendant occupied a peculiar situation of dependence. He was in jeopardy, and not in a position to make a special arrangement or contract with the plaintiff. But rather went to him, and in effect said, "help me with Meredith—get him to buy the remaining portions. The property will be sold, and I must at least raise the amount due under the mortgage, but try and get your man to give $56,000." When Bridgman then saw Meredith again, the latter was reasonably certain he would get the property for less than that figure, and so he declined to give it, but, again, the inference is that, were it not for Bridgman's efforts in seeking this maximum price, Meredith would not have raised to $50,000; that Hepburn would have declined to consider Meredith's first offer of $46,000, and would, instead, take his chance on a forced sale under the mortgage.

As to what would be the position had the defendant kept away from the plaintiff after the negotiations for a loan fell through, I am not now prepared to say, but his arrangement with him for a sale to Meredith, it seems to me, linked the previous retainer and introduction to the second contract constituting a continuous retainer and one introduction, which introduction was the efficient cause in consummating a sale: Millar v. Radford, 19 Times L. R. 576. It was more than a dry introduction—it was the foundation on which the negotiations proceeded and without which they would not have proceeded: Wilkinson v. Martin, 8 C. & P. 5. In Toulmin v. Millar, 58 L. T. N. S. 96, Lord Watson held "that when a proprietor with a view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, to the latter, will be entitled to his commission,

although the price paid should be less than the sum named at the time the employment was given."

If the relation of buyer and seller is brought about by the act of the agent, he is entitled to his commission: Green v. Bartley, 14 C. B. 685.

Bridgman, in my opinion, was employed to bring about privity of contract between the plaintiff and defendant, and I think, having regard to the circumstances peculiar to this case, he succeeded in doing so.

BRITISH COLUMBIA.

GRANT, Co. C.J. MARCH 25TH, 1908.

COUNTY COURT OF VANCOUVER.

RE MALSUFURO.

Aliens—Naturalization—Procedure — Naturalization Act—Amendment — Construction — Powers of County Court Judge—Investigation—Cross-examination on Affidavits.

Applications by Saddjiro Malsufuro, Yasugiro Deguchi, Yomon Asano, Ologiro Shibota, Yasoji Okashi, Massichi Kawakami, Kamekuki Lakeuchi, Kizugahuro Kitashima, Kizuzi Tsunezumi, Kunishada Yoshida, Yonesuki Ishataka, Jubey Kodama, aliens, for certificates of naturalization, under the Naturalization Act.

C. N. Haney and S. D. Schultz, for the applicants.

F. G. T. Lucas, contra.

GRANT, Co. C.J.:—Each of the above-named applicants, through his solicitor, in accordance with the provisions of sec. 17 of the Naturalization Act, filed with the clerk of the County Court of Vancouver a written notice of intention to present at the March sitting of that Court a certificate shewing length of residence in Canada, the taking of the oaths of residence and allegiance, and of his being of good character, and their names were duly posted by the clerk, as required by sub-sec. 2 of sec. 17.

Before the opening of the Court at which the certificates would be presented, objections to the naturalization of these

aliens were filed by Edward Alexander Lucas, a British subject, with the clerk of the Court, on the following grounds:—

1. That the applicants are subjects of the Emperor of Japan, and are not free to swear allegiance to any foreign sovereign.

2. That the applicants do not intend to reside permanently in Canada.

3. That the applicants do not bear allegiance to His Majesty King Edward VII.

4. That the applicants have no conception of the nature of the oaths of residence and allegiance taken by them.

5. That the said oaths of allegiance and residence, as taken by the said applicants, are not binding upon them.

6. That the applicants are making these applications for the purpose of entitling them to certain privileges granted only to British subjects, and have no intention of becoming bona fide British subjects, or of serving His Majesty the King.

Upon the opening of the Court when the certificates were presented and the particulars thereof were openly announced in Court, the objector, through Mr. F. G. T. Lucas, his counsel, offered the same objections to the naturalization of these aliens, and asked that a day be fixed for the cross-examination of the aliens upon their oaths of residence and allegiance.

This Court, as far as the purposes of naturalization were concerned, closed its sittings for the month of March on 9th March, when counsel for the objector again urged his objections to the naturalization of these aliens, and asked for their cross-examination upon their affidavits, and for a hearing in a summary way of the matters of the objections, and a day for the same being set, counsel for the aliens and objector were heard, and the hearing, in a summary way, further adjourned for judgment upon the objection of counsel for the aliens that the Court has no jurisdiction in the matter: (a) that the application is not a proper one; (b) that the objections filed are not within the Act; (c) that, if so, they are not properly before the Court; (d) that the objections as stated are not a proper subject for cross-examination; (e) that the objector is not properly before the Court.

As to the objections of counsel for the aliens to the jurisdiction of the Court and the nature and scope of the objections, the answer is found in the Act itself. Section 18, in part, says: "At any time after the filing of any notice"—that is, of intention to present the certificate aforesaid— "and previous to the sittings of the Court, any person objecting to

the naturalization of the aliens may file in the office of the cleark an opposition in which he shall state the grounds of his objections." By sec. 19, sub-sec. 2: "Where no opposition has been filed to the naturalization of an applicant, and no objection therto has been offered during the sittings, the Court, on the last day of the sittings, shall direct that the certificate of the applicant be filed of record in the Court. And by sec. 22 the aliens shall, after the filing of such certificate, be entitled to a certificate of naturalization, duly authenticated by the seal of the Court. By sub-sec. 3 of sec. 19: "If such opposition has been filed or objection offered, the Court shall hear and determine the same in a summary way, and make such direction or order in the premises as the justice of the case requires."

From the plain reading of the above recited sections, when objections are filed before the sitting of the Court or taken during the sitting of the Court, the Court shall hear and determine the same in a summary manner. To hear and determine the matter means to decide it upon the merits: Re Madden, 31 U. C. R. 333. It is optional with "any person" whether or not he will file an opposition or take an objection to the naturalization of an alien, but, having taken or filed his objection, the Court must deal with the same upon the merits and make such direction or order in the premises as the justice of the case requires.

On the argument it was contended by counsel for the applicants that the objections were really an appeal from the justice of the peace or notary public in granting the certificate presented to the Court, and that In re C. C. Webster, 7 C. L. J. 39, was an authority that the Court could not go behind the certificate and inquire whether the evidence upon which it was granted was sufficient; that it must be presumed that the official who granted it saw that the provisions of the Act has been complied with. While In re C. C. Webster seems to have been followed as an authority as to the weight to be attached to the certificates presented on the part of the applicant, counsel for the objector contends that the amendments to the Naturalization Act, as passed in 1903, and now appearing in R. S. C. 1906 ch. 77, especially secs. 17, 18, and 19, have changed the law as it existed when the decision in In re C. C. Webster was rendered, and that, as the law now stands, the Judge not only has the right but should go behind the certificate of the justice or notary if necessary to get at

the real facts of the matter so as to be able to give the order the justice of the case requires. By the Act of 1868 under which In re C. C. Webster was decided, instead of the provisions now contained in secs. 17, 18 and 19 aforesaid, it was enacted as part of sec. 5 thereof: "And if during such general sittings the facts mentioned in such certificate are not controverted or any other valid objection made to the naturalization of such alien, such Court on the last day of such general sitting shall direct that such certificate be filed of record, and thereupon such alien shall be thereby admitted and confirmed in all the rights and privileges of British birth."

The effect of the decision in In re C. C. Webster was to make the Judges little more than ministerial officers in carrying out the decrees of the justices of the peace and notaries as to who should become naturalized British subjects, and, as might have been expected, the most glaring irregularities occurred in obtaining the certificates of naturalization. These irregularities were brought to the attention of the Dominion government in 1902 in the report of the Royal Commission on Chinese and Japanese Immigration, where the following appears at p. 357: "It is certain that many who were naturalized never resided in Canada for one full year; some of them may have resided here during the fishing season only for a part of 3 years, and yet hundreds of these men, who had not complied with the law, were granted naturalization papers and received their license to fish."

With a knowledge of the gross irregularities as to granting of naturalization papers in accordance with the decision in In re C. C. Webster, the Naturalization Act of 1903 was passed, and is now embodied in R. S. C. 1906 ch. 77. In secs. 17, 18, and 19 is found for the first time in any Canadian Naturalization Act provision for filing with the clerk of the Court notice of intention to apply for naturalization papers, for posting up of a list of the names of the applicants, for filing an opposition to the granting of naturalization to an alien, and for the Court hearing and determining the same in a summary way, and making such directions as the justice of the case may require.

It is permissible in the interpretation of the statute to look at the circumstances under which an amendment of the law is made in order to understand the objects aimed at by the Legislature—see per Lord Halsbury in Eastman v. Comptroller of Patents, [1898] A. C. 576, and per Thesiger, L.J., in Yowen v. Noakes, 6 Q. B. D. 535, and to consider whether

the statute was intended to alter the law or leave it as it was before. I cannot express myself more clearly than in the words of Cozens Hardy, L.J., in In re a Debtor, [1903] 1 K.B. at p. 710: "As a matter of common sense, I ask, were the sections intended to alter the law, or to leave it exactly as it stood before? The only answer must be that they were intended to alter the law." To what purpose was the law to be amended? I should say to remedy the mischief or defect in the law as it was at that time being administered; that is, to prevent as far as possible the fraudulent naturalization of aliens. It is laid down in the judgment of the Court in Shaw v. Great Western R. W. Co., [1894] 1 Q. B. 373, that there is a presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when those statutes were passed. I think that when we consider the Act, as it stood when In re C. C. Webster was decided, the frauds or irregularities perpetrated under it, when administered in accordance with that decision, as shewn by the report of the Royal Commission and the recommendations made to the Commission of "giving to the Judge to whom the justice of the peace or notary's certificate is presented the power to take such measures to satisfy himself that the facts stated in the certificate are true," and the Act as it now stands with the new provisions contained in secs. 17, 18, and 19, the presumption is not only legitimate but irresistible that Parliament intended to change the scope of the Judge's duty as circumscribed in the decision in In re C. C. Webster, and to give the Judge the power to take such measures as might be necessary to satisfy himself that the facts stated in the certificate presented to the Court are true, and to inquire otherwise into the claims and fitness of the applicant to become a British subject.

I therefore order and direct that the certificates of the notary in these matters be now filed, and that the applicants appear before this Court for cross-examination on their oaths of residence and allegiance taken herein, and for examination of such other matters relating to the claim for naturalization as to the Judge may appear necessary, and I fix Monday 30th March, 1908, at 10 o'clock in the forenoon at the court house, Vancouver, as the time and place for same.

BRITISH COLUMBIA.

HOWAY, Co. C.J. MARCH 28TH, 1908.

COUNTY COURT OF NEW WESTMINSTER.

MULLER v. SHIBLEY.

Lien—Woodmen's Lien for Wages Act, R. S. B. C. 1897 ch. 194, sec. 3—" Woodman "—Hire of Horses.

The defendant hired a team of horses from the plaintiff for certain logging operations, and, on default of payment for the use of the horses, which were driven by a man employed by the defendant, the plaintiff filed a lien against the logs for the amount due.

The defendant moved to set aside the lien, which was filed under the provisions of the Woodmen's Lien for Wages Act.

Ladner, for the defendant.

McQuarrie, for the plaintiff.

HOWAY, Co. C.J.:—It was conceded on the argument that the application turns upon the point whether the item " hire of two teams of horses " (which admittedly does not include any service rendered by the plaintiff, but merely represents the amount due by the defendant for the services of the plaintiff's horses under the contract between them) comes within sec. 3 of R. S. B. C. ch. 194.

I am of opinion that it does not, and that the plaintiff, having performed no work on the logs himself, is not entitled to claim a lien under this Act.

A woodman had no lien at common law for labour in cutting, hauling, and driving logs to market, as, though his labour increased the value of the timber on which it was bestowed, the nature of the employment was inconsistent with retention of possession, which is the foundation of a common law lien: Roberts v. Bank of Toronto, 21 A. R. 629.

In this state of the law, the Woodmen's Lien for Wages Act, 1895, was passed, and, in considering whether a contractor like the plaintiff is entitled to a lien under it, the evils aimed at, and the short title of the Act, and possibly the marginal notes to the sections, may be looked at: Hardcastle on Statutes, pp. 112, 215, 216; Heydon's case, 2 Co. Rep. 18. The Act, being in derogation of the common law, should not

be extended beyond the cases specially provided for: Holmested on Mechanics' Liens, p. 3; Haggerty v. Grant, 22 B. C. R. 176.

The short title of the Act, "Woodmen's Lien for Wages Act," indicates that it only protects the worker himself, the wage-earner. The form of statement of claim of lien in the schedule bears out this view. I do not think that a person supplying a team of horses for use in logging under a contract thereby becomes a "woodman." If so, a machinery depot supplying a donkey engine under a similar contract, or a hardware company supplying cables, blocks, and similar equipment, under a similar arrangement, would be entitled to liens as being "woodmen." The marginal notes to sec. 3 lend colour to the view that only the actual labourers have a lien. The legislature in defining the word "person" is particularly careful to indicate workers directly or indirectly engaged in the labour of getting the logs to market. The amendment made by 1905, ch. 57, to sec. 2, sub-sec. (2), points in the same direction: see, too, Davidson v. Frayne, 9 B. C. R. 369. Although there are similar statutes in Ontario, Quebec, and Manitoba, and in some of the American States, I cannot find that the point has arisen there. See, also, Tremeear on Conditional Sales, p. 233 et seq.; Phillips on Mechanics' Liens, sec. 515. However, holding that our statute gives no lien to a contractor such as the plaintiff, I set aside the lien, without prejudice to any other remedy the plaintiff may have against the defendant: see sec. 31.

The plaintiff must pay the costs of this application.

BRITISH COLUMBIA.

MARTIN, J. MARCH 28TH, 1908.

TRIAL.

BUCKWORTH v. NELSON AND FORT SHEPPARD R. W. CO.

Principal and Agent—Agent's Commission on Sales of Lands—Contract—Construction — "Right to Commission"—Pending Sales—Termination of Agency.

Action for commission on the sale of land.

S. S. Taylor, K.C., for plaintiff.

A. H. MacNeill, K.C., for defendants.

MARTIN, J.:—So far as the facts are concerned, the plaintiff is, I think, clearly entitled to the commission sued for on the Clarkson sale, as well as the other sales, unless he can be held to be prevented from recovering because of the language to be found in the letter of 27th July, 1903.

Two very different constructions of that letter are contended for, the defendants, on the one hand, urging that it means that the termination of the agency causes the forfeiture of all commissions, even those already earned, but not paid over; while, on the other hand, the plaintiff submits that its operation is confined to the case of commissions on sales which have not been approved by the company.

Now, while it is manifest that the first construction makes the bargain a very harsh and unbusinesslike arrangement, from the agent's point of view, nevertheless, if no other fair or reasonable construction can be placed upon the words employed, then the plaintiff must suffer from the consequences of his own contract. It is to be observed that, upon either construction, there is an unusual feature, and one for the benefit of the company, in the clause that provides that even after sales have been approved by it, the agent, though he has earned the full commission, is only to receive it, or a proportion of it, as the company collects the principal; the consequence is that the agent not only has the payment of his commission deferred (instead of being paid in full, as usual, when it was earned), but in case the purchaser makes no more payments (because of insolvency or otherwise), the agent loses his commission correspondingly—in other words, it was a partly contingent one, even though the company had accepted the purchaser. I mention this as shewing that admittedly the company, whatever view may be taken of the point under discussion, had already placed themselves in an unusually favourable position as against their agent, and it is not to be assumed that he would contemplate their acquiring further concessions of an unusual business nature unless they were clearly set forth.

After repeatedly weighing the words in question and their context, I have come to the opinion that the true intent and meaning thereof is that the expression "the right to commission" does not relate to commissions actually earned before termination, the right to be paid which, as the principal was received, had already attached and become an obligation to the agent. The expression is a loose one, but

the "right" referred to is the right to claim a commission on sales then under negotiation, but which have not been formally "approved" as "valid" as mentioned in the letter. The object was, I think, to prevent any difficulty which might be expected to arise from the conflicting claims of a former and present agent to a commission on pending sales, which they might well be both more or less instrumental in bringing about. Such proper yet conflicting claims, difficult as they would be of satisfactory adjustment, would place the company in a very embarrassing position, which business men would naturally wish to guard against I do not forget that reliance is placed by the defendants on the words "on all sales the right," etc., and it is contended that they must literally relate to every transaction of sale between the parties. To maintain that contention, however, the defendant must be prepared to go to extreme lengths, e.g., that even if accounts had been made up and settled between the parties at the end of a given month on the basis of commissions that were due on payments of principal received in that month, yet before a cheque (or cash) was actually handed over in settlement of that admitted debt, the company could escape liability by the simple expedient of terminating the agency immediately after the settlement was arrived at. To discharge an employee when he asks for the money he has admittedly justly earned is indeed "a new way to pay old debts," and before I place such an unreasonable and unconscionable construction upon a simple business document, which contains no technical language, and should be construed as it would be viewed by ordinary business men, I must find some clear and unequivocal evidence of such an intention. It is not, however, in my opinion, to be found in this document, and it would be necessary to read into it additional words to fairly give it that unmistakable meaning.

I therefore direct judgment to be entered in favour of the plaintiff, and, if necessary, an account will be taken.

EXCHEQUER COURT OF CANADA.

MARTIN, LOC.J. MARCH 30TH, 1908.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

KDJR v. THE "SPRAY."

Ship—Collision—Evidence as to Fault—Position of Light —Finding of Fact.

Action for damages by a collision.

Yarwood and J. H. Lawson jun., for plaintiff.

Barnard, K.C., for defendants.

MARTIN, LOC. J.:—This action arises from a collision in Nanaimo Harbour on 24th December last, and it is admitted that if the plaintiff's contention is correct with regard to the position of the light amidships on the "Hornelen," then there can be no justification for the "Spray" colliding with her, on the principle I decided in Bank Shipping Co. v. "City of Seattle," 10 B. C. R. 513, 9 Ex. C. R. 146, and therefore it is necessary to determine that question of fact before taking up the other features of the case.

This question very largely turns upon the evidence of the third mate, Hanson, and, in deference to the strong and closely reasoned argument of Mr. Barnard, I adjourned the hearing for the purpose of fully considering the evidence of the various witnesses on the point, with the result that I am satisfied that I must find in favour of the plaintiff's contention. In so doing I have had some difficulty in reaching a satisfactory conclusion, owing to the fact that the plaintiff's witnesses were all foreigners, not one of whom spoke English well enough to make himself at all times thoroughly understood, and I have had to make some allowances for them, because their story sounded better in the witness box than it may look, to some, when reduced to writing upon the record. I may mention that before the examination of the plaintiff's witnesses was taken by consent before me as part of the trial, it was strongly represented to me that the case was one which would probably turn upon the demeanour of the witnesses, and for that reason I was

urged to have them examined before me in person, instead of their evidence being taken de bene esse before the Registrar in the usual way. It is for this reason that I say that it is very largely because of the favourable impression that Hanson created in the witness box that I am able to accept his positive statement, which is not without corroboration, that he himself put up the light, and that it was burning at the time of the collision.

Judgment will therefore be entered in favour of the plaintiff, and the damages will be assessed by the Registrar, assisted by merchants.

BRITISH COLUMBIA.

MARTIN, J. MARCH 31ST, 1908.

TRIAL.

SMITH v. CONSOLIDATED MINING AND SMELTING CO. OF CANADA.

Nuisance—Smoke—Damages—Injunction—Evidence.

Action for damages and an injunction in respect of a nuisance.

J. A. Macdonald, K.C., and E. S. H. Winn, for plaintiff.

A. H. MacNeill, K.C., for defendants.

MARTIN, J.:—At the close of the evidence it became clear that the liability of the defendants for the damage done by the smoke from their smelter could not be seriously disputed, and the real questions for discussion were: (a) the amount of damages; and (b) an injunction.

With respect to damages, they are usually difficult to estimate; I assess them at $1,928.50 on all heads.

With respect to the injunction, I am of opinion that the evidence is not sufficient to warrant my granting it. The testimony of the plaintiff on the point was not precise enough to satisfy me, particularly in view of the fact that his letter of 9th October, 1907, to Stone & Wellington, puts him

in such an unfavourable light that I experience great difficulty in relying on the accuracy of his statements. In circumstances such as exist in this case, I should have been able to give much more favourable consideration to the plaintiff's story had he taken exact observations at the times complained of and been supported by other witnesses on his land when the smoke came on it. I regret that many pressing demands upon my time and my immediate departure from town for some weeks prevent my going into the matter more fully at present, but not to delay judgment longer I think it desirable to now state briefly the result of my deliberations, leaving an extended consideration of the matter for a more convenient time should the parties desire it.

BRITISH COLUMBIA.

IRVING, J. APRIL 6TH, 1908.

TRIAL.

SWANSON v. GRAHAME.

Partnership — Dissolution—Action for—Misrepresentations as to Value—Fraud—Evidence—Counterclaim—Costs.

Action for dissolution of the articles of partnership on the ground of innocent misrepresentation, or, in the alternative, for damages for fraudulent misrepresentation.

F. Peters, K.C., and S. Perry Mills, K.C., for plaintiff.

H. D. Helmcken, K.C., for defendant.

IRVING, J.:—The misrepresentations complained of were: (1) that the property was of the value of $50,000, and that the defendant had been offered that sum for the property; and (2) that the defendant, who was the owner of the mineral claim under a Crown grant giving him the precious metals, had stated that he had acquired from a cement company the right—a grant, or conveyance, or license—in writing, to take the base metals from the portion of the claim under the land owned by the cement company.

At the close of the evidence Mr. Peters admitted that he hardly expected to succeed in the contention that the representations were fraudulently made, and he also admitted, having regard to the nature of the property and to

the fact that there had been a letter with reference to acquiring an option on the property, that he could not expect to succeed on the suggested misrepresentation as to the value of the property, but he pinned his faith to the second misrepresentation, which the plaintiff swore had induced him to go into the partnership.

The case made out in support of or against the charge of misrepresentation is not convincing or satisfactory. The defendant, who owned the land, is an old man, somewhat deaf, and with a defective memory. I am not justified in relying upon everything he says.

The plaintiff is a foreigner, speaking English fairly well and able to decipher a letter written in English. These two men are the main witnesses in the case. They both receive some support from friendly witnesses. I must say that the plaintiff favourably impressed me when he gave his evidence at first; but at the end of the case he was contradicted by several witnesses, two of whom seem to me to be without any interest in the case whatever; the result is that I am not able to accept the plaintiff's version of what was said in January, 1906, as against the positive denial of the defendant.

Now, the real truth of the matter is that these two men, after working together, quarrelled over the working of the mine, and that the plaintiff, not wishing to have trouble with the defendant, went away, intending to return in a few days, but afterwards, some time in August, determined to bring this action on false representations. One of these alleged misrepresentations I have already dealt with. As to the other, I am not satisfied that the defendant did inform the plaintiff that he had obtained the base metals, nor am I satisfied that he told the plaintiff anything more than he believed, viz., that he had received, in answer to his application in respect of the base metals, a letter which he read to the plaintiff—and that he regarded that letter as a favourable answer.

In August, 1906, the defendant notified the plaintiff that he (the defendant) had fortified the plaintiff's share and interest in the claim. This, of course, was beyond his power, and the plaintiff on his side then repudiated the partnership and demanded a settlement. It was in trying to obtain that settlement that the fact came to the knowledge of the plaintiff's solicitor that the defendant had no title

to the base metals. Evidence as to what a man said is at all times very weak evidence. Words are easily mistaken, or misapplied and misunderstood. To accept as reliable the report of a conversation had in January as to a matter which has been deemed of no great importance until August, when the plaintiff began to collect his material for this law suit, would be dangerous. I therefore cannot accept the plaintiff's contention that there was a misrepresentation on this point. Furthermore, if the plaintiff ever did entertain the idea that the defendant had represented that he obtained from the cement company the base metals, he was informed before he left work in June that such was not the case, and I regard his staying on after he had asked the defendant to obtain for him in respect of his own claim the same rights which he, the defendant, was seeking in respect of the partnership claim, as a waiver of the misrepresentation (if any there was). I think under these circumstances I should dismiss the action and allow the parties to arrange a dissolution for themselves.

I find that the plaintiff did not diligently and faithfully employ himself in the matter of the company's business, as he had agreed to do. I find that he only did 54 feet of work instead of 68 feet. I find that the plaintiff supplied materials to the extent of $37.40. I find that the plaintiff is not responsible for the damage to the shed or building.

On the counterclaim I cannot give judgment for the defendant for $25, as the contract seems to have been made with the defendant's wife. The plaintiff having succeeded on the counterclaim, I give to him the costs thereof.

BRITISH COLUMBIA.

CLEMENT, J. APRIL 7TH, 1908.

TRIAL.

TUYTENS v. NOBLE.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Payment of Instalment of Purchase Money to Vendor's Agent—Acknowledgment by Vendor under Seal—Estoppel—Fraud of Agent — Repudiation of Contract.

Action by purchaser against vendor for specific performance of a contract for the sale and purchase of land.

C. M. O'Brian, for plaintiff.
J. Martin, K.C., for defendant.

CLEMENT, J.:—The execution of the agreement by the defendant is admitted; and the agreement when produced shews prima facie that the plaintiff is entitled to judgment; that he has paid $700 on account of the purchase price; and that, on payment of the balance, some $200 odd, he is entitled to a conveyance of the property, free from all incumbrance. But the defendant asserts that the receipt for the $700 which appears in the body of the agreement is not a true statement of the fact; that he was not paid that sum or any sum except $20 on account of the $700, the receipt of which he has acknowledged, as I have said, on the face of the agreement. The plaintiff chose to make the defendant's examination for discovery part of his (plaintiff's) case, and defendant's counsel was content to leave his client's story before the Court in that shape, and did not call any evidence. It appears that the plaintiff negotiated with one Dreyer for the purchase of the lot in question, and finally agreed verbally to take it at $900. The plaintiff did not then know the owner's name, but did know that Dreyer was not purporting to sell his own property. The plaintiff paid $700 to Dreyer on account of the purchase price, and at the same time (practically) agreed with Dreyer that if the transaction went through, and the papers were all right, Dreyer and he should proceed to build on the lot as a joint venture. This arrangement does not, in my opinion, affect the case. The payment of $700 to Dreyer is the payment with which we are concerned, and the only one made by the plaintiff, and, as the defendant has, over his deliberately affixed signature under seal, acknowledged receipt of that sum, it might be contended that this was an admission of Dreyer's authority to receive the payment as his agent, and that the defendant has not displaced this position by satisfactory evidence. I must say that the story told by the defendant is not at all satisfactory; but, on further consideration, I prefer to place my judgment upon another ground.

To resume the narration of the facts. Dreyer, after receiving the $700, went to the defendant and negotiated about the lot. He returned to the plaintiff, with the agreement sued on duly signed by the defendant, and containing, as already mentioned, an express acknowledgment of the receipt of $700 on account of the purchase price of $900. Thereupon the plaintiff signed the agreement, assuming (for

the first time, so far as any binding contract is concerned) the obligations of a vendee, and naturally resting assured that his $700 had reached its intended and proper destination. Dreyer then absconded. In my opinion, this raises against the defendant a clear case of estoppel. Gordon v. James, 30 Ch. D. 249, cited by Mr. O'Brian, is very much in point; and I think I may safely conclude my judgment by a paraphrase of the language of Lindley, L.J., at p. 259: "I confess that when we look at the plaintiff's position it appears to me to be a safe one. He knew, although the defendant did not, that he had parted with his money to Dreyer. The defendant told him by this agreement that he had got his money. He, plaintiff, had no knowledge and no reason to suppose for a moment that that statement was not true, and he had every reason to suppose that it was true. Acting upon that supposition, he went on in perfect security, treating himself as the owner of the property, and, of course, not looking after his $700, which he would have done if his suspicions had been aroused. The defendant by his carelessness, you may say, but I should say by his act, enabled Dreyer to deceive the plaintiff and lull him into security, and prevent his having recourse to him who got his money from him by that trick."

There will be judgment for the plaintiff for specific performance, with, if the plaintiff desire it, a reference as to title. If title is accepted, then the defendant should be directed, on payment by the plaintiff of $201.50, to execute a conveyance of the property, free from all incumbrance, to the plaintiff. As the defendant has repudiated the agreement, the plaintiff may, if he please, take judgment for $750 to cover the money paid, interest thereon, and damages. The defendant must pay the costs of this action.

ALBERTA.

BECK, J. DECEMBER 3RD, 1907.

CHAMBERS.

RUTHERFORD v. WALKER.

Costs—Action for Specific Performance of Contract for Sale of Land—Action Prematurely Brought — Payment of Purchase Money by Instalments—Defect in Title.

Motion by plaintiff for an order disposing of the costs of the action.

O. M. Biggar, for plaintiff.

J. K. Macdonald, for defendant.

BECK, J.:—By consent of the parties, I am to dispose of the question of the costs of this action.

The statement of claim alleges: (1) an agreement dated 13th April, 1907, whereby the defendant agreed to sell to the plaintiff certain lots for $600, payable $200 down, $200 on 3rd October, 1907, and $200 on 3rd April, 1908, with interest at the rate of 8 per cent. per annum; (2) a covenant to convey a clear title on payment of the principal of the purchase money and interest; (3) payment of the down payment; (4) tender on 27th August, 1907 (the writ was issued on the 29th), of the whole balance due, with interest up to 3rd April, 1908; (5) a demand and refusal of a transfer; and specific performance is claimed.

The statement of defence restates the agreement, and alleges that at the time of the tender there was no money due by the plaintiff to the defendant; that, under the terms of the agreement, the defendant was not required to make title until the date of the last payment, namely, 3rd April, 1908, and that he was ready and willing to perform the agreement accordingly. It was agreed by counsel that the facts were that the defendant's supposed title depended upon an agreement in his favour, but that it had been by a mistake that his vendor had sold him the lots in question, inasmuch as by an error in the description she purported to sell lots in which she had no interest, and that it was with the knowledge of the fact that the defendant had no title that the plaintiff brought this action, with a view of inducing the defendant and his vendor to hasten to a conclusion their efforts to acquire title, efforts which they were making inasmuch as the plaintiff had made improvements upon the lots, and that in the result the defendant did acquire title, leaving nothing to be disposed of in this action but the question of costs.

Brown v. Cole, 14 Sim. 427, cited apparently with approval in Bovill v. Endle, [1896] 1 Ch. 648, in effect decides that a debtor cannot compel his creditor to accept payment of a debt not yet payable, even though, if it bear interest, the interest to the date of maturity accompanies a tender of the principal. See also Burns v. Boyd, 19 U. C. R. 547.

This being the law, I am of opinion that an action in the form laid could not be maintained prior to the date fixed

for payment of the last instalment. The plaintiff could, no doubt, have brought an action to rescind the agreement and to obtain a refund of his down payment and damages, but he not only did not take this course, but I should judge did not desire this remedy.

Again, I think he could have successfully resisted an action to recover any of the deferred payments on the ground of want of or defect in the plaintiff's title, until a clear title were shewn. I cannot, however, see how, had this action proceeded in its present form, he could have obtained any form of relief, and I, therefore, cannot see that I can make any other order than that the plaintiff pay the defendant the costs of the action; and I so order.

ALBERTA.

TAYLOR, DIST. CT. J. APRIL 1ST, 1908

CHAMBERS.

RE STONEY PLAIN MUNICIPAL ELECTION.

Municipal Elections—Councillors for Village—Alberta Village Act, 1907—Villages already Organized—Application of Act—Resignation of Candidate—No Power to Withdraw—Void Election.

Application by Israel Umbach, an elector and ratepayer of the village of Stoney Plain, for an order that the councillors elected for the village be ousted from office, on the following grounds:—

1. That the councillors were elected unduly and contrary to the provisions of the Village Act.

2. That John H. Forester, having been nominated as councillor and having resigned such nomination, was ineligible for election as councillor, and his election was invalid.

3. That the election of John H. Forester voided the entire poll.

4. That such councillors and council were not elected at the time appointed by the Minister of Public Works of the government of Alberta, as required by the Village Act.

5. That the returning officer for the election was not appointed by the Minister of Public Works of the government of Alberta, as required by the Village Act.

6. That no notice of the time and place where the election was to be held was given by the Minister of Public Works of the province of Alberta, as required by the Village Act.

J. K. Macdonald, for the applicant.

William Short, K.C., for John H. Forester.

TAYLOR, DIST. CT. J.:—The village of Stoney Plain was organized prior to the coming into force of the Village Act of 1907. Section 5 of this Act states that overseers of the villages organized before the coming into force of the Act shall have all the powers and perform the duties of councillors under this Act.

The overseer, so far as the evidence goes, seems to have carried out his duties and to have properly taken the necessary proceedings for the election of the council.

I find that Miller and Opperhauser were properly elected as councillors.

I am of the opinion that sec. 16 is intended to apply only to villages organized after the Act of 1907 came into force, and in no way applies to villages already organized.

As regards Forester, sec. 10, sub-sec. 4, provides that whenever more than the number of candidates are nominated that are required to complete the council, any one may resign before the poll is closed. Three were all that were required, and 9 were nominated. It is clear then that Forester could resign. He did so in writing. Before the poll *closed* he wrote the returning officer withdrawing his resig*nation*. So far as I can find, there is no provision in the Act for the withdrawal of a resignation.

I find, therefore, that Forester having resigned, the votes cast for him became null and void, and he was wrongfully declared elected by the returning officer.

Forester is therefore ousted from the office of councillor.

ALBERTA.

HARVEY, J. APRIL 2ND, 1908.

TRIAL.

SKINNER v. SHIRKEY AND MORRIS.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments — Default — Time of Essence—Right of Vendor to Rescind—Return of Instalment or Deposit Paid—Provision for Retention by Vendor—Penalty or Liquidated Damages—Forfeiture —Relief—Set off—Damages—Depreciation in Property.

Action by purchaser against vendor for specific performance of a contract for the sale of land, or, in the alternative, for the recovery of $600 paid by the plaintiff on account of the purchase price.

S. E. Bolton, for plaintiff.

D. H. McKinnon, for defendants.

HARVEY, J.:—On 9th January, 1907, the plaintiff entered into a written agreement with defendant Shirkey, acting therein for himself and his co-defendant, they being the owners of the land in question as executors, by which the plaintiff agreed to buy and the defendant Shirkey agreed to sell a lot of land situated in the town of Lacombe. The consideration and terms of payment were specified as follows: "The sum of $2,500 to be paid in the following manner: the sum of $600 upon the execution and delivery of this contract (the receipt is hereby acknowledged by the vendor), and the balance of $1,900, less the amount of a mortgage to the British Columbia Permanent Loan and Savings Company, in equal payments of $100 every 3 months, together with interest from the date hereof at the rate of 8 per cent. per annum on so much of such purchase money as remains unpaid from time to time and payable on 9th January in each and every year hereafter until the said purchase price is paid." It was agreed between the parties that as soon as the exact amount secured by the loan company's mortgage was ascertained, a transfer should be given and

a mortgage back taken to secure the unpaid purchase money. There was a conflict of testimony as to who was to ascertain the amount of the loan company's mortgage, but, in the disposition I propose to make of the case, I do not find it necessary to decide the point. It is admitted, however, that plaintiff told defendant he could not get a statement from the company, and defendant said he could get one, that he did get one which is dated 26th March, but that he did not shew it to plaintiff, and he says that he intended to cancel the agreement as soon as there was default in the payment of the $100 instalment. The payments on this mortgage, however, were payable at the first of each month, and about 1st February the company's agent called on plaintiff for a payment. The agent says the plaintiff admitted his liability, and told him to call again in the afternoon; that he did call, but that plaintiff was out; that when he met defendant in the street he told him, and that defendant gave him a cheque for the payment due, and said he would look after the payments in the future.

The contract contains the following provisions: "And it is further agreed that in case the purchaser shall at any time make default in any of the payments by himself herein agreed to be paid, or in any part thereof, or in the performance of any of the covenants herein contained, the vendor shall be at liberty at any time after such default, without notice to the purchaser, either to cancel this contract and declare the same void, and to retain any payments that may have been made on account thereof as and by way of liquidated damages, and retain all improvements that may have been made on said premises, or to proceed to another sale of the said lands, either by public auction, tender, or private contract, and the deficiency, if any, occasioned by such resale, with all costs, charges, and expenses attending the same or occasioned by such default, shall be made good by the said purchaser, and the vendor shall be entitled immediately upon any default as aforesaid, without giving any notice or making any demand, to consider and treat the purchaser as tenant, holding over without permission or any colour of right, and may take immediate possession of the premises and remove the purchaser therefrom.

"And it is mutually understood and agreed that in case default be made by the purchaser in any of the covenants and agreements herein contained to be performed by . . sel . . and the vendor shall see fit to declare this con-

tract null and void by reason thereof, such declaration may be made by notice from the vendor addressed to the purchaser directed to the post office hereinbefore mentioned.

"And it is further agreed that time is to be considered the essence of this agreement."

On 13th April, plaintiff heard some rumour that defendant intended to cancel the contract, and thereby being reminded that he was in default, for, though no date is specified in terms for the first payment of $100, both parties appear to have assumed that it was due in 3 months from the date of the contract, viz., on 9th April, he at once sent a cheque to the defendant for $69.25 with a letter in the following terms: "Lacombe, April 13, 1907. J. W. Shirkey, Esq., Lacombe. Dear Sir:—I find that the payment was due on the property I purchased from you on April the 9th, but I was waiting for you to produce a statement from the loan company to shew the amount due against this property, and also arrange the second mortgage, as was agreed upon, and I would be very much obliged if you would attend to this matter at once. Mr. Spice informs me that you collected the rent from him for January and February. This would amount to $30.75, and I am enclosing you cheque for the balance due, $69.25. I have sent the payment to the loan company for January, February, March, and April, amounting to $54. Kindly acknowledge receipt of $100 and oblige, yours faithfully." (At foot of letter "J.D.S.").

On the same date defendant's advocate, under instructions which defendant says were given the day before, wrote the following letter to plaintiff: "April 13, 1907. James D. Skinner, Esq., Lacombe, Alta. Dear Sir: Mr. John W. Shirkey has instructed us to notify you that owing to your having failed to comply with the provisions of a certain agreement made between him and yourself for the sale and purchase of lot No. 8 in block 10 in the town of Lacombe on 9th January, 1907, you have forfeited any and all rights by the said agreement conferred, and in performance of the powers therein contained the said is cancelled. Yours truly, Durie & MacDonald." And a few days later followed it up with another returning the cheque, which was as follows: "April 18, 1907. James D. Skinner, Esq., Lacombe, Alta. Dear Sir: At the request of Mr. John W. Shirkey we return to you herewith your cheque payable to him or order for the sum of $69.25, and dated April 13, 1907, as the agree-

ment under which this has apparently been paid has been cancelled. Yours truly, Durie & MacDonald." The plaintiff thereupon filed a caveat, and, after some other correspondence had passed between the advocates, this action was begun.

The plaintiff claims specific performance, or, in the alternative, a return of the $600 paid on account of the purchase money. The defence is that the defendant cancelled the agreement by virtue of its terms by reason of plaintiff's default, and therefore the $600 was forfeited.

On the argument before me plaintiff's counsel intimated his willingness, not to say preference, to have the alternative claim for a return of the $600 treated as the principal claim. I shall, therefore, assume the validity of the cancellation of the agreement by the vendor for the purpose of the consideration of this claim. The authorities are by no means at one on the question of the purchaser's right to a return of moneys paid, upon a rescission of the contract by the vendor, even in the absence of an express stipulation, as in the present case, that it should be forfeited. Among Canadian authorities it has been held that the purchaser cannot recover it in the following cases: Fraser v. Ryan, 24 A. R. 441; Gibbons v. Cozens, 29 O. R. 356; Pierson v. Canada Permanent Mortgage Corporation, 1 W. L. R. 99, 11 B. C. R. 139; Forfar v. Sage, 5 W. L. R. 263; and Gudgel v. Case, 4 W. L. R. 462; while, on the other hand, it has been recovered in Steele v. McCarthy, 6 W. L. R. 396; Stringer v. Oliver, 6 Terr. L. R. 519; and Labelle v. O'Connor, 11 O. W. R. 95, 15 O. L. R. 519.

It appears to me that possibly some of the divergence of opinion is due to a failure to distinguish between a payment by way of deposit and one on account of purchase price, the former of which it appears clear from the English authorities is subject to forfeiture on the purchaser failing to complete the purpose for which it is given, being as a guarantee that the contract will be carried out. See Howe v. Smith, 27 Ch. D. 89. It appears, however, quite clear from the last mentioned case that even a deposit will not be forfeited in every case of default. Cotton, L.J., at p. 95 says: "I do not say that in all cases where the Court would refuse specific performance the vendor ought to be entitled to retain the deposit . . .In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay suffi-

cient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

In Barclay v. Messenger, 43 L. J. Ch. 449, two sums were paid, £200 on the signing of the agreement, and £800 later. The contract contained the provision that in case of default "all money paid previous to such default being made shall be absolutely forfeited and the contract become null and void." The action was for specific performance, which was refused, on the ground of the plaintiffs' default and their inability to perform the contract, but the refusal was "without prejudice to the right of the plaintiffs to bring such action as they may be advised to recover the £1,000."

In Clark v. Wallis the vendor was given judgment for a rescission of the contract, but was required to account for the moneys received on account of the purchase price. The report of this case, however, does not indicate that there was any clause providing for forfeiture, but in In re Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022, £2,000 had been paid on the execution of the agreement, and £2,000 remained to be paid, and it was provided that in default the vendor might take possession and eject the purchaser. There was default, and the vendor brought action to eject, which was refused, Sir G. Mellish, L.J., saying: "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed —in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole £2,000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve."

In Barton v. Capewall Continental Patents Co., 68 L. T. 857, the agreement, which was for the sale of patent rights for £14,000, of which £1,400 was paid, and the remaining £12,600 to be paid later, contained a clause providing that in case of breach of any condition all payments theretofore made should be absolutely forfeited as and by way of liquidated damages. The purchaser failed to pay the instalments, and the contract was rescinded, and the plaintiffs brought the action to recover the £1,400. It was held that the sum was

a penalty and not liquidated damages, and that the vendor should only recover the actual damages.

The present case is distinguished from most of the cases cited in that there was no substantial but only a technical default which the defendant was waiting for in order to take advantage of, and that, far from repudiating or doing anything that might be treated as shewing an intention of repudiating the contract, the plaintiff was ready and anxious to complete, and therefore, even if the sum paid had been simply a deposit, on the authority of Howe v. Smith, as explained by Cotton, L.J., the vendor would not have been entitled to retain it. But the amount both absolutely and relatively to the purchase price is so large as to indicate that it was not a deposit, and there is nothing in the contract to indicate that it was to be considered other than part of the purchase price pure and simple, and on the authorities last cited it appears to me clear that it is to be treated as a penalty against which the Court will relieve.

The question then is, is the defendant entitled to retain any portion if it to compensate for damages suffered? Evidence was given to shew a depreciation in value of the property since the sale, but clearly the plaintiff is in no way responsible for any damage suffered by reason of such depreciation. It was not through his default that the defendant lost the benefit of the sale, but through the defendant's own refusal to allow him to complete the contract. It may be said, however, that the registration of the caveat by the plaintiff has prevented the sale, and the plaintiff is for that reason liable. It is objected to this that no claim is made for any such consideration by the pleadings, and that, if there had been, perhaps the plaintiff would have abandoned his caveat. It appears to me also that this is a question outside of the contract, and any such damage would not be a matter of set-off against the moneys in defendant's hands, even if they could be recovered in this action if properly pleaded by way of counterclaim. In any event, the evidence is not such as to shew what, if any, depreciation occurred before the filing of the caveat, and what, if any, after, and therefore I cannot consider the question.

There being no damage shewn, therefore, for which the plaintiff is liable, he is entitled to judgment for the full sum of $600 with costs.

ALBERTA.

TAYLOR, DIST. CT. J. APRIL 3RD, 1908.

TRIAL.

STENNETT v. CITY OF EDMONTON.

Municipal Corporation—Ownership of Electric Light Works —Light Supplied to House—Remedy for Non-payment—Lien — Enforcement against Landlord on Tenant's Default.

Action for the return of a certain sum paid by the plaintiff under protest, being for an electric light bill due from a tenant of the plaintiff who had removed without paying the account.

John Cormack, for plaintiff.

J. C. F. Bown, K.C., for defendants.

TAYLOR, DIST. CT. J.:—The plaintiff asserts that there was nothing owing by him to the defendants, and that the defendants, having neglected to collect the account from the tenant, have no remedy against him.

The defendants maintain that they have a lien for this under sec. 12 of schedule "A," ch. 19 of the Ordinance of the North-West Territories, 1904.

The part of sec. 12 on which the defendants rely is: "(2) The sum payable by the owner or occupant of any house, tenement, lot, or part of lot, for the water supplied to him there, or for the use thereof, and all rates, costs, and charges by this Ordinance to be collected in the same manner as water rates, shall be a preferential lien and charge on the house, tenement, lot, or part of lot, and may be levied and collected in like manner as municipal rates and taxes are by law recoverable."

Later on in the schedule, under the heading "Lighting, Heating, and Power Works," the defendants are given power to manufacture and supply gas and electricity for lighting, heating, or power purposes, and to fix, collect, and enforce payment of rates, etc.

Had sec. 27, which gives the power to enforce payment, referred to sec. 12, or contained the words " in the same manner as water rates," there would have been no doubt in the matter, but, instead of this, it sets forth in detail how payment is to be enforced, either by action in a court of competent jurisdiction, or by the distress or sale of goods and chattels of the person owing such rates, charges, rents, etc.

I am of opinion that having made definite provision for enforcing payment, it was not the intention of the legislature to apply the extraordinary remedy set out in sec. 12 to such rates.

I will therefore give judgment for the plaintiff with costs.

SASKATCHEWAN.

NEWLANDS, J. DECEMBER 28TH, 1907.

TRIAL.

MUNROE v. BEISCHEL.

Principal and Agent—Agent's Commission on Sale of Land —Employment of Agent to Find Purchaser—Sale to Purchaser not Found by Agent — Services Rendered—Remuneration—Quantum Meruit—Pleading.

Action for commission for selling a section of land.

J. F. Frame, Regina, for the plaintiff.

F. W. G. Haultain, K.C., for the defendant.

NEWLANDS, J.:—The plaintiff claimed 5 per cent., but at the trial amended his statement of claim to a commission of $1 per acre instead of 5 per cent., claiming $640. It is alleged in the statement of claim that the plaintiff found a purchaser in one Henry Crockett, to whom the land was sold for $18,560. At the trial the plaintiff contended that there was no denial of this statement, and, therefore, there was an admission on the part of the defendant that the land was sold to Henry Crockett for that amount. I reserved my decision on this contention.

The defence to this claim is that the plaintiff was not employed on the terms alleged in the statement of claim, but on the terms that plaintiff should find a purchaser for said land at a price to net the defendant $28 per acre, and that plaintiff did not procure the purchaser for said lands at a price to net the defendant $28 per acre, or at all.

I do not think it was necessary for the defendant to deny specifically that the lands were sold to one Henry Crockett for the sum of $18,560. The action is for commission because plaintiff obtained Henry Crockett as a purchaser, and if he did not obtain Crockett as a purchaser it is immaterial at what price the land was sold to him. The gist of the action is the earning of the commission, and defendant has specifically denied that plaintiff found the purchaser to buy the lands at any price, and, therefore, I think it unnecessary for him to deny that the lands were sold to Crockett at the price alleged in the statement of claim, it not being material; and if it is not material it need not be denied.

The evidence given at the trial shewed that the plaintiff had been employed by defendant to sell this land. The plaintiff sought to shew that he was the only agent for the sale of this land, and that defendant, not reserving the right to himself to sell, could not do so, but must make the sale through the plaintiff. He, however, failed to prove this, and there was nothing in the agreement between the parties which would prevent the defendant from selling or in any other way determining the plaintiff's agency.

The evidence shews that the land was sold to Henry Crockett for a price which was satisfactory to defendant, viz., $17,000, he being given by defendant some personal property along with the land. The plaintiff alleges that he obtained Henry Crockett as the purchaser, and is, therefore, entitled to the commission. I do not think this has been proved. That he did something towards selling the land I think he has proved, but he did not obtain the purchaser. Crackett was in correspondence with the defendant about this land before plaintiff had anything to do with him, and he sent his son to look at it, and afterwards went down for the same purpose himself. The plaintiff shewed the land to both Crockett and his son, and in that way assisted in the sale, and defendant recognized this in asking plaintiff to bring him over to Weyburn to complete the sale. This plaintiff did not do. If he had, he might have been entitled to the commission he claims, but, under the circumstances of this case, he

is not. As, however, he assisted in the sale, and though the land was not sold at a price to net the defendant $28 per acre, it was sold at a price satisfactory to him, I think the plaintiff is entitled to some remuneration for his services, especially as defendant recognized he was so assisting in asking him to bring Crockett to him; and I will, therefore, allow him half the commission claimed, viz., $320, and his costs of action.

SASKATCHEWAN.

RIMMER, DIST. CT. J. FEBRUARY 12TH, 1908

DISTRICT COURT.

REX v. BAIRD.

Prairie Fire Ordinance—Conviction—Appeal after Plea of "Guilty" — Application of Ordinance in Incorporated Town — Offence — Evidence — Amount of Penalty on a First Conviction—Amendment—Reduction.

The defendant lived in the town of Carlyle, and, whilst burning some rubbish, allowed the fire to pass out of his control and on to the land of his neighbour. An information was laid before a magistrate, under the Prairie Fire Ordinance. At the hearing the defendant pleaded "guilty," and was convicted, but subsequently appealed to the District Court Judge, on the grounds, inter alia: (1) that no offence was committed within the meaning of the Act; (3) that the fire was kindled on a town lot, and all reasonable efforts were made to keep it under control; (4) that the Prairie Fire Ordinance does not apply to land situate in an incorporated town; (8) that the fine imposed was excessive; and (9) that the order made was bad in law, as well as on the merits.

W. H. Williams, for the defendant.

E. W. F. Harris, for the complainant.

RIMMER, DIST. CT. J.:—The defendant appeals from a summary conviction of D. C. McFee, a justice of the peace

for the province, made at Carlyle on 16th October, 1907. The conviction shews that the defendant was convicted "for that he, the said J. Baird, on 15th October, 1907, at Carlyle in the said province, did permit a fire to pass from his land to the land of J. T. Street of Carlyle," and it adjudges the defendant for his said offence to pay a fine of $200 and costs, and in default of payment in 30 days to be imprisoned for 6 months. The minute of the proceedings before the justice, signed by him, shews that J. Baird was charged that he did on 15th October, 1907, at Carlyle, permit a fire to pass from his land contrary to sub-sec. (b) of sec. 2 of the Prairie Fire Ordinance, that the defendant appeared and pleaded "guilty," and that the adjudication above stated was made.

The first ground taken by counsel for the appellant is, that no offence was committed within the meaning of sub-sec. (b) of sec. 2 of ch. 87 of the Consolidated Ordinances, 1898. As to this point, I hold that the appellant is estopped by his plea of guilty from denying that he permitted a fire to pass contrary to the sub-section: Rex v. Brook, 5 Terr. L. R. 368, 7 Can. Crim. Cas. 216. The appellant's counsel submitted in this connection that the proceedings before the justice were oppressive, in that the accused was not questioned as to whether he had cause to shew, in accordance with sec. 721 of the Criminal Code. The objection was not raised before the justice, and, as it is not raised expressly by the grounds of appeal, I do not consider that it is now open to his counsel: Rex v. Bowman, 2 Can. Crim. Cas. 89; Rex v. Brook, 5 Terr. L. R. 369. I further consider that the onus of proof of irregularity lies on the appellant. In the absence of material evidence, the principle to be applied is that everything is presumed to be done which ought to have been done. I find no evidence of omission. I find that the defendant pleaded "guilty."

The second objection stated in the grounds of appeal is a corollary of the first and is already disposed of.

The third objection is in effect that the act of the appellant in permitting the fire to pass from his own land was involuntary; that there was no malice or neglect of legal duty. Evidence was submitted and taken, subject to objection of the respondent's counsel, with a view to establishing that the appellant took some precautions. It was not convincing. Certainly I would give it no weight as against the appellant's account of what took place before

the magistrate. The magistrate asked "Guilty or not guilty?" "I replied 'guilty.' I said nothing more on that point." And again: "I can read the summons. I should call myself an educated man. I entered no protest against the short notice." Other admissions on cross-examination shewed a degree of carelessness.

In view of the appellant's admissions and of his plea of "guilty" to a complaint setting out expressly the words "permit a fire to pass from your land on to the land of J. F. Stent, contrary to sub-sec. (b) of sec. 2 of the Prairie Fire Ordinance," convincing proof that the justice acted oppressively, that the accused was denied some legal right, or that some inducement to make the plea was held out, should be made before I can be expected seriously to regard this ground of appeal. I find no such proof.

Objections 3 and 4 may be taken together. They are, in brief, that the Prairie Fire Ordinance does not apply to a person who starts a fire in an incorporated town. In dealing with this objection I may premise that there is no evidence before me that Carlyle is an incorporated town. There is evidence that the fire started on the appellant's land in Carlyle, and that it passed to the land of Stent. There is evidence that Stent's land is within the limits of Carlyle. As a preliminary point, the appellant's counsel raised the objection that the conviction was bad on its face, as it did not state where the lands of Stent were situate, and cited Village of Carmen v. Fisher, 1 W. L. R. 276. That case must, however, be distinguished from the present, as the proceedings were taken to quash by certiorari. Upon appeal the point loses significance when it is found that the summons refers to the lands of Stent of Carlyle. Following the reasoning of the learned Chief Justice in a Yorkton case, I think the accused had sufficient knowledge to leave no doubt in his mind as to where the lands were. I refer to Rex v. Shepherd, 6 Can. Crim. Cas. 483, in which case it was held that it was not necessary to state the location of the house, save to shew that it was within the jurisdiction.

Many authorities were cited by counsel for the appellant upon the construction to be given a penal statute. Upon consideration of the whole Act, I have no doubt that the mischief aimed at was the spread of disastrous prairie and forest fires, with consequent damage to crops, stock, and houses. Its purpose is clear in a country dependent upon

a farming industry. I find nothing within the Ordinance which is derogatory of its general application. Counsel for the appellant cited no sufficient authority for the exemption of municipalities, and, within the time at my disposal, I have been unable to discover any exemption. I can conceive no reason why the power of municipalities to further protect against the spread of fire in the town should be construed as interfering with the operation of a general Act.

The objections that the fine was excessive and the order made contrary to law are those which require gravest consideration on appeal. The penalty imposed, $200, was undoubtedly the maximum provided by the Prairie Fire Ordinance. The adjudication of imprisonment for 6 months imposed on the defendant was certainly in excess of the power of the justice: Regina v. Mathewson, 1 Terr. L. R. 168; Regina v. Hamilton, 1 Terr. L. R. 172; sec. 739 of the Criminal Code. It was argued for the appellant that, in view of the excess, no course was open to the Court save to quash the conviction, and a number of cases in support were cited. It was argued for the respondent, following Rex v. Bowman, supra, that there is no power in this Court, after a plea of "guilty," to exercise the discretion vested in the justice at the trial, and that the only duty of the Court was to give effect as far as possible to discretion by reducing the penalty to the maximum within the statute.

I am unable to accede to either of these views. The cases cited for the appellant were nearly all decisions given on proceedings by way of certiorari. There is the great distinction that certiorari is a proceeding to quash for a defect, and the Court deals with the matter only on the material returned by the justice. On an appeal the Court hears the case de novo and forms a judgment as it is presented before the court of appeal. Then on certiorari it has been authoritatively held in Ex p. Myers, 1 Can. Crim. Cas. 131, by the Court of Appeal in Nova Scotia, that the conviction and adjudication can be amended. This decision was cited with approval by Rouleau, J., in our Courts in Rex v. Whiffin, 4 Can. Crim. Cas. 141. In the present instance the accused selected his forum; fearing that the conviction would not be quashed if a motion was made for certiorari, he appeals to a Court which has power to deal with the merits. At one time, 1889, it was certainly doubted in our own Courts whether there was power to

amend on appeal: Regina v. Tebo, 1 Terr. L. R. 199, where McGuire, J., expresses an opinion based on language similar to that of the present sec. 751, contained in sec. 80 of the Summary Convictions Act. The Criminal Code, sec. 880, now sec. 751, however, amended the provisions of sec. 80 of the Summary Convictions Act. Upon careful consideration of secs. 751, 752, and 754 of the present Code, I have no doubt that this Court is the absolute judge of facts as well as law, and that it is the duty of the Court to deal with the case de novo on its merits. In this respect I follow the decision of the full Court of Appeal of Nova Scotia in Rex v. McNutt, 4 Can. Crim. Cas. 398, in preference to that of a single Judge, Rex v. Bowman, supra, given under a statute of British Columbia.

Upon the merits of the appeal, I think that the justice in adjudging the maximum penalty acted harshly and upon wrong principles. Power is not given to be exercised to its utmost limit on a first conviction, save under special circumstances. In this case the damage done to Stent's property was not a special circumstance to be taken into consideration. For this Stent had a civil remedy reserved by the Ordinance. The resulting damage had no bearing on the degree of negligence. On the case, as presented before me, I hold that the proper penalty would be $50 and costs of the proceedings before the justice, and in default one month's imprisonment.

Following the case of Rex v. McNutt, cited above, I order that under sec. 754 of the Code the conviction be modified accordingly.

SASKATCHEWAN.

RIMMER, DIST. CT. J. MARCH 5TH, 1908.

DISTRICT COURT.

RE ROBERT AND WEIR.

Master and Servant Ordinance—Magistrates' Want of Jurisdiction, when Service Terminated—Farm Labourer—Menial Servant—Period of Service—Wages — Notice — Termination of Employment.

An appeal by the complainant to the District Court from a magistrate's order dismissing a complaint under the Master and Servant Ordinance.

H. N. Morphy, for the appellant.

N. T. Lockhart, for the respondent.

RIMMER, DIST. CT. J.:—This is an appeal from an order of J. G. Hastings, a justice of the peace, dismissing a complaint under sec. 3 of the Master and Servant Ordinance, that the respondent unlawfully refused to pay to the appellant $46 for a part of two months' wages, the same having been first demanded.

I find on the evidence that on 4th July, 1907, the appellant agreed to work for the respondent for 4 months at $35 per month, as a farm labourer; that he commenced work on 6th July, 1907, and left the respondent on 10th September. The respondent up to that date had paid $28.90 on account of wages. In accordance with agreement, the appellant lived on the premises of and was found in food by the respondent. I have some difficulty in finding on the evidence of John Weir that the appellant did not leave with his consent. The complaint was not made until November, 1907.

Upon these facts I hold that the appellant was a menial servant: Newton v. Abbott, 4 L. J. 155; Nicol v. Greaves, 12 W. R. 961; and the contract for service for 4 months would be determined by a month's warning or by payment of a month's wages: Turner v. Mason, 14 L. J. 311; Taylor v. Kinsey, 4 Terr. L. R. 179. Unless it was terminated by mutual consent, the appellant forfeited a month's wages by leaving on 10th September: Manson v. McKen, 4 W. L. R. 545; but there would be $6.10 due to him to 6th August, 1907.

On the appeal it was objected on the part of the respondent that where the evidence shewed that the master had a civil right against the servant on the contract, the Master and Servant Ordinance did not apply, and the magistrate had no jurisdiction. I am unable to accede to that objection. Sub-sections 3, 4, 5 and 6 of sec. 3 were repealed: Acts of 1907, ch. 32, sec. 4. This repeal was contemporaneous with the provisions which give the District Court jurisdiction on appeal: District Courts Act, 1907, ch. 9. As the Ordinance stands, I hold the intention of the legislature to be that where there is a continuing relation of master and servant, the magistrate shall have jurisdiction to hear a complaint of non-payment of wages and to make an order for payment of wages (not exceeding 2 months', the

same having been first demanded), and discharging the servant from his employment; that where the relation continues, the magistrate is judge of law and of fact, subject to the right of appeal to the District Court. To avail himself of the provisions of the section, the servant must complain to the justice and ask for an order of discharge while the relation continues (in case of wrongful dismissal, the relation may be said to continue but for the act of the master).

The appellant in the present instance did not take this course. He did not apply to the justice until November, 2 months after he had left the employment of the respondent. The Ordinance requires a complaint on the oath of the servant against his master. For similar cases see Helps v. Emo, 9 L. J. 302, and Folansby v. McCullum, Man. Cas. temp. Wood 4. The appellant had by his own act or consent determined the relation on 10th September, 1907. On the evidence I hold that he was not the servant of the respondent in November when the complaint was made. In such case he could not proceed under the Ordinance.

Appeal dismissed with costs.

SASKATCHEWAN.

JOHNSTONE, J. APRIL 4TH, 1908.

CHAMBERS.

RE SEABORN AND HANSBERGER.

Land Titles Act—Execution — Registration — Mortgage — Priorities—Certificate of Title—Ownership.

Summons obtained by Walter E. Seaborn under the Land Titles Act to vacate the registration of a writ of execution against the lands of James E. Davis at the suit of N. F. Hansberger.

G. E. Taylor, for Seaborn.

C. E. Armstrong, for Hansberger.

JOHNSTONE, J.:—On 9th June, 1906, James E. Davis and Eleanor B. Davis, of the district of Moose Jaw, in the

province of Saskatchewan, transferred all their real and personal estate, without specifically describing lands, to the Saskatchewan Trust Company of Moose Jaw, in trust, after payment of certain costs, to pay all the debts and liabilities of the transferors distributing the proceeds of the property transferred amongst the creditors of the transferors ratably, proportionately, and without preference or priority. This transfer purports to have been made in pursuance of the Act respecting Assignments and Preferences by Insolvent Persons, cited as "The Assignments Act, 1906," which Act, however, did not come into force until 1st August of that year, and contains a general power of attorney to George Edward Taylor. On 12th March, 1908, a summons was granted upon the application of Walter Ernest Seaborn calling upon all parties concerned to attend before the presiding Judge in Chambers at Moose Jaw on 17th March, 1908, to shew cause why an order should not be made that the registration of the writ of execution of registry against the lands of James E. Davis at the suit of N. F. Hansberger should not be vacated. The summons was served on the solicitors of N. F. Hansberger, as appears by the admission of service indorsed on such summons, but no service was effected on the transferors. The application was supported by the affidavit of Walter Ernest Seaborn, setting forth that on 14th June, 1907, one Alexander C. McKean had made a mortgage to Seaborn of the lands in question for the sum of $2,200, which mortgage was registered on 27th August, 1907, and subsequently assigned to the Northern Trusts Company as security for an advance made by such Northern Trusts Company to Seaborn; that demand had been made upon the registrar for the issue of a certificate of title free from the charge of the execution of N. F. Hansberger against James E. Davis; that the lands in question had been transferred to Alexander C. McKean by a transfer registered as 3,567 on 29th August, 1907 (this transfer bears date 14th June, 1907); and further that on 10th June, 1907, James E. Davis, by his attorney George Edward Taylor, had transferred said lands to the Saskatchewan Trusts Company aforesaid. From the abstract of title it appears that Hansberger's execution was registered in the Land Titles office on 12th February, 1907; that a transfer from Davis to the Saskatchewan Trust Company was registered on 12th June, 1907; that a certificate of title issued to the Saskatchewan Trust Company of Moose

Jaw on 12th June, 1907, which company transferred to Alexander C. McKean the lands in question on 26th August, 1907, and the transfer was registered on 27th August, 1907, on which day a certificate of title issued to Alexander C. McKean, who mortgaged to the applicant, Walter E. Seaborn, as of 14th June, 1907. This mortgage was registered on 27th August, 1907.

There is no evidence whatever adduced in support of the application shewing under what section of the Land Titles Act the demand referred to in the affidavit was made upon the registrar. No application appears to have been made to him under sec. 158 of the Act. Provision is made by sec. 128 of the Land Titles Act whereby the assignee may file an assignment made under the Assignments Act, and make an application to the registrar to be registered as owner of any lands mentioned in such assignment, who may thereupon transmit the land to such assignee, who shall thereupon become the owner. This section provides, however, that its provisions shall not affect any lands of the person making such assignment which are exempt from seizure by sale under execution. There is no proof that the lands transferred by Taylor, the attorney of James E. Davis, did not comprise his homestead, and, as Davis seems to have had no notice of this application, and as the transfer by Taylor to the Saskatchewan Trust Company may have been made without the knowledge and consent of Davis, I think the registrar very properly refused to declare such assignee the owner, even had he the authority to do so under this section. It did not appear that the land in question was land which had passed under the transfer by James E. Davis and his wife to the Saskatchewan Trust Co. I express no opinion as to the power of the registrar, under the circumstances of this case, to entertain an application to vacate under the provisions of the Land Titles Act, or of the Court or Judge to grant relief under like circumstances without suit in that behalf.

The summons will be discharged with costs, for the reasons given.

SASKATCHEWAN.

WETMORE, C.J. APRIL 6TH, 1908.

CHAMBERS.

EQUITY FIRE INSURANCE CO. v. COULTHARD-ALEXANDER CO.

ANGLO-AMERICAN FIRE INSURANCE CO. v. COULTHARD-ALEXANDER CO.

Parties—Joinder of Defendants—Separate Causes of Action—Libel—Leave to Amend by Alleging Joint Cause of Action—Pleading—Election.

Summons obtained by the defendants for an order staying proceedings or requiring the plaintiffs to elect against which of the defendants (the company and W. A. Coulthard) they would proceed, and in default of such election for an order dismissing the actions.

J. A. Allan, for defendants.

T. S. McMorran, for plaintiffs.

WETMORE, C.J.:—These actions are brought for alleged libel of the plaintiffs, and such libels are contained in a letter to one W. R. Tucker, dated 4th December last. The statements of claim in each action are the same, one statement of claim alleging the libel against the Equity Fire Insurance Company, and the other the one against the Anglo-American Fire Insurance Company.

The statements of claim each contain 6 paragraphs. The third paragraph alleges that this letter was written by the defendant company, and the fourth paragraph states in the alternative that it was written by the defendant Coulthard. Or, in other words, the statement of claim in each case joins an action against the defendant company with a separate action against the defendant Coulthard in respect to the libels.

The defendants obtained a Chambers summons for an order staying proceedings in the actions or requiring the plaintiffs to elect against which of the defendants they would proceed, and, in default of such election, to dismiss

the actions. On shewing cause against this summons, a copy of the letter on which the alleged actions are based was produced. That letter purports to be signed "The Coulthard-Alexander Co., Ltd., by W. A. Coulthard, president."

I think it is very clear that these two causes of action cannot be joined, at any rate without leave of a Judge. It is true that the causes of action against each defendant arise out of the same transaction, but the pleader has not seen fit to bring a joint action against both defendants; but, as I have stated, he has brought an action against each defendant alleging against each a separate cause of action. The only rule of practice under which it could by any pretence be contended that the practice would authorize such a proceeding would be Rule 29 of the Judicature Ordinance, which corresponds with Order XVI., Rule 4, of the English Rules. It has been repeatedly held by the English Courts that that Rule applies to joinder of parties, not to joinder of causes of action. The Rule governing the matter of joinder of causes of action is Rule 1 of Order XVIII. of the English Rules, which corresponds with Rule 79 of the Judicature Ordinance.

In Smurthwaite v. Hannay, [1894] A. C. 494, the question of the right to join several plaintiffs in one action when there were separate rights of action by each plaintiff was considered, and it was held that under the circumstances of that case the plaintiffs could not be joined. Of course the question came up under Rule 1 of Order XVI., which was the same practically as Rule 26 of the Judicature Ordinance. But in deciding the question Lord Russell of Killowen was clearly of opinion, and it seems to me correctly so, that Rules 1 and 4 of the Order must have the same construction, that is, if Rule 1 was as wide in its application as contended for by the plaintiffs, then Rule 4 would be equally wide to allow the joinder of all sorts of defendants ; and Lord Herschell, Lord Chancellor, at p. 500, states: "Order XVI., Rule 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in Order XVIII." And Lord Russell, at p. 504, says: "Order XVI. is conversant with the subject matter different from that dealt with by Order XVIII. Order XVI., principally in Rules 1 and 4, deals with the parties to an action, but, in my judgment, Order XVIII. deals and deals only with the causes of action

which may be joined together in an action properly constituted as to parties under Order XVI."

I would also refer to Sadler v. Great Western R. W. Co., [1896] A. C. 450. That was a common law action also—and it is important to bear that in mind all through the consideration of this question. It was an action against two defendants in which it was alleged "that each of the defendants by their several acts and that the defendants by their combined acts have obstructed the plaintiff's access to his premises," and claimed damages against them and each of them and an injunction. It was held that these causes of action could not be combined. A fortiori, in an action such as the present, where the plaintiffs claim against each of the defendants severally, the causes of action cannot be joined. I will refer also to Gower v. Couldridge, [1898] 1 Q. B. 348; Nyblett v. Williams, 6 Times L. R. 200; and Hinds v. Town of Barrie, 6 O. L. R. 656, 660, 2 O. W. R. 995, in which Osler, J.A., lays down: "Different defendants cannot be brought before the Court, for the same action, where the real causes of action that exist against them are separate."

It is possible that the plaintiffs might apply and obtain leave under Rule 32 of the Judicature Ordinance to join both defendants. I express no opinion with respect to that; I merely refer to the Rule; and it also may be that they could bring their actions against both of the defendants jointly, and if at the trial they proved a joint libel by both, or a separate libel by either one of them, they might recover against both or either one as the case may be. But they have been mistaken in their practice, in my opinion, and this application must be granted.

The order will be that the plaintiffs do, within 14 days after service of the order, elect against which of the defendants they will proceed; or they may, within that time, amend their statement of claim by alleging a joint cause of action against both defendants. On default of their either so electing or amending, their actions to be dismissed with costs. This order not to interfere with plaintiffs' right to make an application to a Judge under Rule 32 of the Judicature Ordinance, provided that such application be made before the expiration of the 14 days.

The plaintiffs will pay the defendants' costs of this application in any event.

Order in each action the same.

SASKATCHEWAN.

WETMORE, C.J. APRIL 8TH, 1908.

CHAMBERS.

UNION BANK v. JORDON.

Mortgage—Sale under Judgment — Sale Subject to Prior — Mortgage—Confirmation—Invalidity of Registered Executions—Homestead Exemption—Originating Summons —Jurisdiction—Declaration of Invalidity—Status of Execution Creditors.

Application by plaintiffs to confirm the sale of the north-west quarter of section 30, township 6, range 13, west of second, made under foreclosure and sale proceedings upon a mortgage from the defendant Jordon to the plaintiffs.

T. S. McMorran, Regina, for the plaintiffs.

T. D. Brown, Regina, for the defendants Doran and Baxter.

WETMORE, C.J.:—The defendant Mergens held a prior mortgage to the plaintiffs', made and registered before theirs. The other defendants are execution creditors, whose executions appear on the abstract of title to have been registered before either the mortgage of Mergens or of the plaintiffs. My brother Newlands made an order for sale of the land in question, and directed that the moneys realized from such sale be paid into Court to the credit of this cause, to be applied, firstly, in payment of the amount which might be found due to the plaintiffs under their mortgage, together with all costs of the proceedings, as far as the same would extend; the balance to be paid to the remaining defendants upon application for such purpose; and he ordered that when such sale had been effected, the purchaser was to receive a vesting order vesting the land in him free from all incumbrances. It was conceded on the part of the plaintiffs that there was a mistake in taking this order out, in so far as Mergens's mortgage was concerned, and that the order should have been for the sale of the land subject to Mergens's mortgage. Accordingly, when the land was sold, the auctioneer stated that it was sold subject to Mergens's mortgage, and in confirming the sale I am requested by the plaintiffs to confirm the sale subject to that mortgage.

Upon application to me for confirmation, I issued a summons calling upon all persons interested to shew cause why an order should not be made confirming the sale subject to the mortgage of Mergens, and directing the registrar of land titles to cancel the existing certificate of title and issue a new certificate in the name of the plaintiffs, free from all incumbrances save and except that of the mortgage to Mergens, and why the registration of the various executions against the land should not be held and declared as not binding. I may say the lands were bought in by the plaintiffs at the sale in question.

The ground upon which it is contended that the executions in question are invalid against this land is that such land was exempt from seizure under execution, it being the homestead of the defendant Jordon. That fact was established, and I assume that it was for that reason my brother Newlands held that the executions were not binding upon this land.

At the return of the summons issued by me, the only defendants who appeared were Doran and Baxter, execution creditors, who appeared by counsel and set up that there was no jurisdiction by originating summons to declare these executions invalid. I may say, in the first place, that I would not attempt, even if I considered the point well taken, to give effect to it, for I would not think of practically overruling the decision of my brother Newlands, from whose order no appeal has been taken. In such case I would refer the matter to the Court en banc. But I am of opinion that this question is decided by authority. The question came up in Bocz v. Spiller, 6 Terr. L. R. 225, 2 W. L. R. 280, and it was there held that a Judge had jurisdiction to deal with the matter by originating summons issued in a foreclosure proceeding.

It was then urged that the sale was subject to the executions. I am most decidedly of the opinion that that is not correct, because the order of sale directed the land to be sold, the money realized to be first applied in payment of the plaintiffs' claim as before stated, and the vesting order was to be free from all incumbrances. Under such an order, the learned Judge could never have contemplated that the sale was to be subject to these incumbrances.

Then it was contended that, inasmuch as the order did not state that the sale was to be subject to Mergens's mortgage, it (the sale) was invalid. I am at a loss to see in what

way any prior incumbrancer has been prejudiced by the sale, seeing that it was distinctly announced that the sale was to be subject to this mortgage, and the purchaser purchased with a full knowledge of that fact.

Then it was argued that the equity of redemption should have been sold. I am afraid that I do not quite understand this point. What was sold was the land subject to prior incumbrances, and that is the usual form of sale, and seems to be the correct form.

I may add, with respect to this matter, that, having ruled that the execution creditors have no claims against the land, it seems to me that Messrs. Doran and Baxter have no locus standi to raise any objections at all—they are not concerned in it.

The order will be that the sale be confirmed, and that an order issue vesting the land in the purchaser free from all incumbrances whatever, except that of the mortgage to Mergens, and that the moneys paid into Court be paid out: first, in payment of the plaintiffs' costs of this action, including the costs of sale; second, the balance to be paid out to the plaintiffs on account of the amount due them on the mortgage; and that the registrar of land titles do cancel the existing certificate of title to the defendant Jordon and issue a new certificate to the plaintiffs free from all incumbrances except the mortgage to the defendant Mergens.

SASKATCHEWAN.

LAMONT, J. APRIL 8TH, 1908.

CHAMBERS.

RE NELSON FORD LUMBER CO.

Company—Winding-up—Petition for—Status of Petitioners —Foreign Company not Registered—Foreign Companies Ordinance.

Petition by the Winnipeg Paint and Glass Company for an order directing that the Nelson Ford Lumber Company be wound up under the provisions of the Winding-up Act and amendments.

T. S. McMorran, Regina, for the Winnipeg Paint and Glass Co.

W. B. Willoughby, Moose Jaw, for the Nelson Ford Lumber Co.

LAMONT, J.:—The petitioners are a company incorporated under the laws of Manitoba, but not registered in this province, who for some time have been doing business with the Nelson Ford Lumber Co., also an incorporated company with head office at Estevan, in this province.

The petition alleges that the Nelson Ford Lumber Co. are unable to pay their debts in full; that they are indebted to the petitioners in the sum of $2,920.89; that the said sum is past due and owing; and that, although repeatedly requested to pay the said amount, they have refused and neglected so to do.

The Nelson Ford Lumber Company, by one of their directors, Mr. Ford, filed an affidavit denying the correctness of the allegations set out in the petition, and also alleging that the petitioners were not registered in this province, as required by the provisions of the Foreign Companies Ordinance; and it was argued that not being registered in this province, the petitioners had no locus standi before the Court.

On the evidence, I find that the petitioners are not registered under the Foreign Companies Ordinance, and the question is: Does this debar them from presenting or proceeding with their petition?

Section 10 of the Foreign Companies Ordinance reads as follows: "Any foreign company required by this Ordinance to become registered shall not while unregistered be capable of maintaining any action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories in the course of or in connection with business carried on without registration contrary to the provisions of section 3 hereof. 2. In any action or proceeding, the burden of shewing that it is registered shall be upon the company."

There can be no question that the present application is a proceeding in Court. Neither can there be any question that it is in respect of a contract made in the province in connection with the business carried on by the petitioners, for it is only as "creditors" that the petitioners can make the application: R. S. C. 1906 ch. 144, sec. 12. Are the petitioners, then, a foreign company required by the Ordinance to be registered?

Section 3 of the Foreign Companies Ordinance provides as follows: "3. (1) Unless otherwise provided by any Ordinance, no foreign company having gain for its object or a

part of its object shall carry on any part of its business in the Territories unless it is duly registered under this Ordinance. . . . (3) The taking orders by travellers for goods, wares, or merchandise to be subsequently imported into the Territories to fill such orders, or the buying or selling of such goods, wares, or merchandise by correspondence, if the company has no registered agent or representative, and no warehouse, office, or place of business in the Territories, the onus of proving which shall in any prosecution under this section rest on the accused, shall not be deemed to be carrying on business under the meaning of this Ordinance."

This section requires the company to be registered unless they come within the exception provided for in sub-sec. 3. To bring them within that sub-section, they must shew that the orders for the goods delivered in respect of which the indebtedness arose were taken by a traveller, and that the company had no resident agent or representative, and had no warehouse, office, or place of business in the province. The onus of bringing the company within this sub-section is on the petitioners. There is evidence before me that the orders were taken by a traveller, but there is no evidence whatever that the petitioners did not have a resident agent or representative or a warehouse, office, or place of business within the province. In the absence of such evidence, they do not bring themselves within sub-sec. 3.

The petition will therefore be dismissed with costs.

SASKATCHEWAN.

JOHNSTONE, J. APRIL 9TH, 1908.

CHAMBERS.

GILROY v. PROE.

Mortgage—Foreclosure — Defence — Extension of Time for Payment of Instalment—Agreement — Consideration — Oral Contract—Evidence.

Application by way of originating summons for foreclosure and immediate possession.

W. M. Martin, Regina, for plaintiff.

C. E. D. Wood, Regina, for defendant.

JOHNSTONE, J.:—In support of the application there was filed an affidavit of the plaintiff proving default and circum-

stances shewing that the defendant had no intention to farm the property during the season of 1908, and a probable loss to the plaintiff in consequence. The sale price of the property was some $13,000. Nothing was paid by the defendant on account of the purchase price. An instalment fell due on 1st December, 1906. This, with interest, was paid, but default was made in the instalment which fell due on 1st December, 1907. The defendant had raised a crop on the premises in the year 1907, consisting of 1,000 bushels of wheat and something over 600 bushels of oats. The property sold by the plaintiff to the defendant consisted of real estate covered by the mortgage in question, and personal estate to the value of $2,700, and plaintiff, in payment of the latter, had taken several promissory notes from the defendant without any security. One of these notes fell due prior to the issue of the originating summons. Before taking these proceedings, the plaintiff, on several occasions, both personally and through her solicitor, endeavoured to obtain security from the defendant for both payments in arrears as well as notes unsecured and not yet due. It was only after seizure under distraining power given by the mortgage that a bill of sale was given by the defendant to the plaintiff on all the goods and chattels sold by her to the defendant at the time the mortgage was given. The defendant contended and filed affidavits and adduced other evidence to support this contention that this bill of sale was given to obtain an extension of time which it was agreed he should have for the payment of moneys past due.

In cross-examination upon his affidavit, defendant said a payment of $500 and interest, due on the mortgage last December, had not yet been paid except by giving a bill of sale as security of the stock and implements. That was in January. Plaintiff's solicitor had asked him (defendant) if he wanted to stay on the farm, and, upon receiving a reply in the affirmative, had answered, "Well, give the bill of sale and go ahead." He thought the bill of sale was taken in payment of the amount due on the mortgage, but would not swear that anything was said about it. Defendant admitted having had a number of conversations with plaintiff's solicitor, as well as with the plaintiff, respecting this. His evidence reads as follows:—

"Q.—Now, was anything said at any of these conversations whereby you were to have your payment which was due

in December extended until next fall if you gave that bill of sale?

"A.—That was the agreement with Miss Gilroy when I took the farm, if I couldn't meet my payments she would not press me.

"Q.—Was anything said at any of these conversations by which that payment was to be postponed until the fall of 1908 if you gave that bill of sale?

"A.—Well, you said I could go on and work——

"Q.—Just answer my question; was anything said about extending the payment until the fall of 1908?

"A.—I think that is extending the payment. You said if I gave the bill of sale I could go ahead and work the farm.

"Q.—Was that the only thing that was said about extending the payment until 1908?

"A.—I think so."

Plaintiff's solicitor gave evidence to the effect that no such understanding was arrived at or was ever intended to be arrived at.

I have arrived at the conclusion in this matter that the plaintiff is entitled to an order for immediate possession and sale.

An agreement for good consideration to extend the time for payment of an instalment of principal and interest or both can be enforced: Williams v. Stern, 5 Q. B. D. 409 (in appeal): but such agreement when verbal must be supported by evidence clear and convincing. The evidence adduced here on behalf of the defendant in support of his contention is not clear and convincing.

It is clear that there was no express agreement. Even from the point of view of the defendant's case, this must be conceded. His contended arrangement is a matter of inference drawn from observations made by Mr. Balfour, which inference I find was not warranted under the circumstances.

SASKATCHEWAN.

LAMONT, J. APRIL 10TH, 1908.

CHAMBERS.

REX EX REL. TOBEY v. McDONALD.

Municipal Elections—Election of Councillor—Qualification of Voters—Payment of Taxes—Declaration of Voter.

On 12th February, 1908, the relator, Tobey, obtained a summons calling upon the respondent George McDonald

to shew cause why an order should not be made ousting the said McDonald from his position as councilman for local improvement district 23-N-3, on the grounds that E. G. Geates, Amos George, Ewan W. Mutch, Frank Ray, Earl Ray, Elmer Ray, H. Young, F. Cleaver and H. Halvoeson, and one Joseph O. Johnstone, voted at the said election for said George McDonald, and were not properly qualified to vote, inasmuch as the taxes of the said persons had not been paid.

A. M. Panton, for the relator, moved the summons absolute on 19th March, 1908.

No one appeared for the respondent.

LAMONT, J.:—On the return of the summons counsel for the relator read the affidavits of the relator Tobey, John Matheson, and F. H. Fitzgerald, from which it appeared that an election had been held for the local improvement district 23-N-3 on 13th January, 1908; that at that election George McDonald, the respondent, and one John Matheson, had been candidates for the position of councilman for the said district; that 11 votes were cast for the said John Matheson, and 15 votes were cast for the said George McDonald, who was declared elected; that of the 11 votes cast for the said John Matheson, one was cast by Joseph O. Johnstone, who had not paid the taxes due to the district for the land on which he voted; that of the 15 voters who voted for the said George McDonald, the 9 whose names are set out first in the summons had not paid the taxes due to the district against the lands in respect of which they voted.

For the relator, it was argued by Mr. Panton that, although these 9 were owners of land in the district and had signed the declaration required to be signed by sec. 21 of the Local Improvements Act, being ch. 36 of the Acts of 1906, they were not entitled to vote, because the taxes due to the district against the land on which they qualified to vote were not paid.

The law governing the right to vote at an election under the Local Improvements Act is found in secs. 18 and 21 of that Act. Section 18 reads as follows: "At any election all persons who are owners or occupants of ratable land in the division shall be entitled to vote." And sec. 21 is as follows: "Every elector of the division may vote for as many persons as are required to be elected, but prior to the voting

shall sign a declaration before the returning officer in form A in the schedule to this Act, and record his vote as provided in such form." Form A referred to in this section is as follows: "The undersigned severally declare each for himself that he is a ratepayer in the above mentioned division and votes in respect to the land set opposite his name hereto, that all taxes due the district against such land have been paid, and that he votes for the person as set beside his name hereto."

In Rex ex rel. Stan v. Grant, I held that the legislature, having amended form A to include a statement that all taxes due to the district were paid, intended that form A should be signed as a pre-requisite to vote. By signing form A the voter declares that all taxes against the land in respect of which he votes are paid. In the present case the 9 voters referred to signed the declaration in form A and voted. The evidence shews that the statements made by them in the declarations that their taxes were paid were not correct, as the taxes were not paid. If these votes are invalid, McDonald had not a majority of the votes cast, and was, therefore, not duly elected. The question then is: Is the payment of the taxes necessary before a ratepayer has a right to vote? I am of opinion that it is. Section 21 requires a person to sign the declaration in form A before voting. I cannot imagine the intention of the legislature to have been to give a person a right to vote if he signed the declaration in form A when that declaration was not true. Yet that is the interpretation I must put upon the Act if I hold that these 9 votes were good and valid votes. I am of opinion that the legislature intended that not only must the voter sign the declaration in form A, but that the statements therein made by him must be true. As the statements made in the declarations by these voters, in so far as the payment of taxes was concerned, were not true, I hold these votes to be invalid votes. The election will, therefore, be set aside, the respondent McDonald ousted from the office of councillor, and the office declared vacant.

As the respondent was not responsible for the invalid votes, and has not in any way opposed this application, there will be no costs. The money paid into Court may be paid out to the relator.

SASKATCHEWAN.

JOHNSTONE, J. APRIL 10TH, 1908.

TRIAL.

HARRIS v. DARROCH.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent of Vendor to Sell—Statute of Frauds—Receipt—Specific Performance.

Action by purchaser against vendor for specific performance of a contract to sell the north-east quarter of section 1, township 1, range 32, west of the 1st meridian, and for damages for refusal by the defendant to deliver up possession of the property agreed to be sold.

T. D. Brown, Regina, for plaintiff.

E. L. Elwood, Moosomin, for defendant.

JOHNSTONE, J.:—In December, 1906, the defendant, Stuart Darroch, by writing under seal, authorized one Gilliland, of Carievale, in the province of Saskatchewan, to sell certain lands then owned by the defendant. This document is in the following words: "I hereby authorize William James Gilliland, of Carievale, in the province of Saskatchewan, to sell for me and in my name, the S. W. ¼ N. E. ¼ of section 1, township 1, range 31-32, at and for the price or sum of $6,400, payable as follows: $2,000 down, balance in 5 years or as much cash possible down with interest at 6 per cent. per annum. Description of land: Improvements:—Two fifty acres broken, one hundred twenty-five ready for crop, buildings worth $500. And upon such sale I agree to pay the following commission: 4 per cent. if sale is made at above price in cash out of 1st payment, or if sold by W. J. Gilliland, and I further appoint the said W. J. Gilliland my attorney in this behalf, with power and authority to make a contract for the sale of said land in accordance with the terms above set forth, and I agree that this authority shall continue in force for until withdrawn months from date. In witness whereof I have hereunto set my hand and seal this day of Dec., A.D. 1906.

Signed, Sealed and Delivered
in the presence of

Stuart Darroch."
(Seal).

On 4th March, 1907, the defendant sent to his agent the following letter:—

"Edmonton, March 4, 1907.

"Mr. W. J. Gilliland,

"Carievale.

"Dear Sir: How is real estate moving in that country anyway? Have been expecting to hear from you re my farm before this; if I don't sell at once will have to rent. If the railway is extended from Tyleton, it should put land in that locality in big demand, and consequently prices should go up. See what is the very best you can do for me and write me at once or wire, and I will answer likewise. I would much rather dispose of it than rent, and would like to get as much cash down as possible. You might send me one of your loan forms, that in case I don't sell I would put a loan on the N.W. ¼ of 6-1-31, and try and sell the N.E. ¼ of 1-1-32. Awaiting an early reply, I am, yours truly, Stuart Darroch, box 615."

Between the receipt of this letter and 11th March, the agent had been carrying on negotiations with the plaintiff with a view of selling to him the lands referred to, with result that on the latter date Gilliland sent the following message to Darroch:

"Carievale, March 11th, 1907. To Stuart Darroch, Edmonton. Am offered twenty-six hundred for north east of one, five hundred cash. Three hundred three months, balance three payments, six per cent., privilege paying all balance one year, wire answer. W. J. Gilliland."

On the same day Darroch replied in these words:

"Accept the offer, forward agreement, writing."

Upon receipt of this telegram, the agent sold the property in question to the plaintiff, and reduced the contract of sale to writing, and had the same executed by the plaintiff, after which the agent forwarded the agreement to the defendant for signature by him. This document is dated 13th March, and contains the price and terms of sale, namely, $2,600, payable $500 on or before the execution of the agreement, the further sum of $300 on or before 15th June, 1907, and the balance of the purchase price in 3 equal payments of $600 each on or before 1st April in the years 1908, 1909, and 1910, with interest at the rate of 6 per cent. per annum on the sum of $1,800, to be computed from 15th March, 1907. The vendee, it was agreed, should have possession on 15th March, 1907, and be at liberty to pay off the whole of

the balance of the purchase money and interest at any time. On the day following the execution of the agreement by the plaintiff, he, the plaintiff, paid to Gilliland the first payment of $500 and took Gilliland's receipt in the following words: " Village of Carrievale, Sask., March 4th, 1907. Received from Jas. Wm. Harris five hundred dollars, being for first payment to Stuart Darroch on the N.E. ¼ of sec. 1, tp. 1, rge. 32, as per agreement of Mch. 13-07. W. J. Gilliland, for Stuart Darroch."

The case was heard before me at Arcola at the January sittings. It was contended by counsel for the defendant that there was no completed agreement between the parties; that the receipt for $500 and the agreement above referred to as having been signed by Harris did not constitute such a contract; that the terms contained in the written contract entered into by the plaintiff could not be imported into the receipt so as to constitute a binding contract within the provisions of the Statute of Frauds. Further, that the formal contract entered into by the agent was not such a contract as the agent had authority to make.

The first question to be considered is: was the agent possessed of such authority as authorized him to enter into the contract referred to, that is, the contract signed by the plaintiff? The authority given to the agent in December, 1906, namely, "I further appoint the said W. J. Gilliland my attorney in this behalf, with power and authority to make a sale of said land in accordance with the terms set forth," was still a subsisting appointment. This finding is supported by the letter of the defendant of 4th March. In Rosenbaum v. Belson, [1900] 2 Ch. 268, Buckley, J., in a case where the authority consisted of these words (contained in a letter), " Please sell for me my houses, and I agree to pay you a commission on the purchase price accepted," held that these words were an authority to sell, and further held that "a sale prima facie means a sale effectual in point of law, including the execution of a contract, where the law requires a contract in writing. I do not find anything in the circumstances of this case which induces me to say that the word 'sell' here means less than this." At p. 271 the learned Judge is reported as saying: "I have been unable to find any case in which it has been held that instructions given by A. B. to sell for him his house, and an agreement to pay so much on the purchase price accepted, are not an authority to make a binding contract, including an authority

to sign an agreement. If a power of attorney were given to A. B. to sell an estate, he would, in my opinion, be entitled, in the absence of anything narrowing the meaning of the word 'sell,' not only to negotiate for, but to sign, an agreement for sale: and that would give to the word 'sell' its full meaning—namely, to conclude a binding agreement for sale."

In view of the facts and law just stated, I am clearly of the opinion that the agent Gilliland had full authority not only to enter into the contract prepared by him and signed by the plaintiff, but that he also had authority (had he so chosen) to have signed the same, and, if such receipt and contract can be read together, there was a completed and binding contract to satisfy the Statute of Frauds, and one which could be enforced by a decree for specific performance.

I am furthermore of opinion that the receipt referred to, together with the writing signed by Harris, constituted a good and binding contract. In Shardlow v. Cotterell, 20 Ch. D. 90, it was held, following Long v. Millar, 4 C. P. D. 450, that several documents could be joined and read together so as to constitute a contract between the parties The question then arises, did what took place by the agent in receiving the $500, and through giving the receipt therefor, and endeavouring to import into such receipt the contract reduced by him into writing, constitute a completed contract? I think it did, and, in this opinion, I am supported by the authority of the Master of the Rolls in Gibbins v. North Eastern R. W. Co., 11 Beav. 1. Here a negotiation was entered into for the purchase of the plaintiff's property, and, on 15th January, 1846, a letter is written by the defendant's agent in which he says: "I am directed to offer you for the premises referred to, £3,000 . . . I say three thousand pounds." The price is here emphatically stated to be £3,000. The answer to this letter, which is dated 16th January, commences thus: "In reply to yours of yesterday, we beg to inform you we accept your offer for the estate at Mile End." The Master of the Rolls then proceeded to say: "So far the matter is clear, for there is a distinct offer and a distinct acceptance of that offer: and there can be no doubt that, according to the law of this Court, this would constitute a valid contract, the sum of £3,000 being distinctly offered, and distinctly accepted. I do not think that this proposition has been denied; but the letter of acceptance proceeds, 'If

you approve of the enclosed, sign the same, and, on the receipt of the deposit, we will sign you a copy.' What is the meaning of this? Is it to contradict the first part of the letter? Does it mean that we accept the offer, but reject it unless you sign the enclosed memorandum? Or rather, is it not an acceptance and a proposal of a more formal mode of carrying the acceptance into execution? If the latter be the meaning, then, according to the authority produced, this would not destroy the contract. If it was a mode of carrying a contract into effect, it did not alter the existing contract, though the proposed mode was different from that which the law would direct; for, where there is a contract, the law prescribes the mode of its performance." This decision was followed in the case of Bonnewell v. Jenkins, 8 Ch. D. 70, at p. 73. James, L.J., lays down the law in the following way: "I am clearly of opinion that the order of Mr. Justice Fry ought to be affirmed. Whether there is a binding contract or not depends on the construction of two letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. There are indeed cases, such as Rossiter v. Miller, where the Court may hold that the reference to the future contract is such as to shew that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances. Here there is an unconditional acceptance by the defendant of the plaintiff's offer, and the reference to the preparation of a formal contract appears to me to be immaterial."

As to the question of damages for breach of contract in not allowing the plaintiff into possession, the evidence adduced at the trial as to what damage the plaintiff had sustained by reason of such refusal was not of a very satisfactory character. No evidence of a specific stated amount of damage sustained by him was proved. I think, however, the plaintiff did suffer damage to the extent of $100 at least, which amount I allow him.

There will be judgment for the plaintiff for specific performance of the contract, a reference to the local registrar as to title, and to ascertain the amount due under the agreement, which sum shall be paid into Court within two weeks after the local registrar shall have made his report, the moneys to abide further order. The question of further directions and costs to be reserved until after the report shall have been filed.

SASKATCHEWAN.

JOHNSTONE, J. APRIL 10TH, 1908.

CHAMBERS.

DEERING HARVESTER CO. v. BLACK.

Limitations of Actions—Claim on Promissory Notes—Conditional Offers to Pay Money—Letter Acknowledgment in Writing to Take Case out of Statute—Requisites.

A question of law having been raised on the pleadings, the parties agreed to submit the same for adjudication upon the following statement of facts admitted:—

1. The plaintiffs sue on two promissory notes, both dated 13th September, 1898, and due respectively on 1st October, 1899, and 1st October, 1900, and both bearing interest.

2. Nothing has ever been paid by the defendant on account of the said notes.

3. The action was commenced on 4th December, 1906.

4. There was never any other debt owing from the defendant to the plaintiffs.

5. On 5th January, 1901, the defendant wrote to the plaintiffs a letter in the following words and figures:—

"Fontantelli, 5th January, 1901.

"Deering Harvester Company,
Chicago, Ills.

"Dear Sirs: In view of the fact that I have reached the time when I must either compromise with my creditors or go into bankruptcy, I write you at this time to learn whether or not you will accept a small sum in full payment of my obligation to your company. Conditioned upon my being able to make the same terms with other creditors, I will pay you $5 in full discharge of your claim against me, some time about February 1st next. The only possible benefit I can gain by this course is the saving of time. There is no other alternative, and if you do not wish to accept this offer, a reply to this letter is unnecessary. Yours truly, John S. Black."

The question submitted to the Court is: Was the letter written by the defendant a sufficient acknowledgment of his

indebtedness to take the notes sued on out of the provisions of the Ordinances respecting limitations of actions in certain cases?

T. S. McMorran, Regina, for plaintiffs.

G. E. Taylor, Moosejaw, for defendant.

JOHNSTONE, J.:—The law as to acknowledgments has been clearly expressed in Green v. Humphreys, 26 Ch. D. 474; and, to take a case out of the statute, there must be an acknowledgment or promise to pay; and where there is a clear acknowledgment of what is due from the person giving that acknowledgment, a promise to pay will be inferred. The law is laid down by Bowen, L.J., at p. 479, that an acknowledgment must be clear in order to raise the implication of a promise to pay. "An acknowledgment which is not clear will not raise that inference. There may be an acknowledgment of a debt which would, if it stood by itself, be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because, not merely is there found in the words something that expresses less than a promise to pay, but because the words express the lesser in such a way as to exclude the greater."

In the document produced, the defendant in using these words, "I write you at this time to learn whether or not you will accept a small sum in full payment of my obligation to your company," expresses by implication a promise to pay. The words, to my mind, clearly come within the definition given as creating an acknowledgment of an obligation or liability. I think this acknowledgment, however, coupled as it is with the words "'conditioned upon my being able to make the same terms with my other creditors, I will pay you $5 in full discharge of your claim against me," prevents the possibility of the implication of a promise to pay arising, and that the letter does not constitute such an acknowledgment or promise to pay as to take the case out of the statute.

In arriving at this conclusion I have referred to the cases following: Tanner v. Smart, 6 B. & C. 603; Sidwell v. Mason, 2 H. & N. 306; In re Bethell, 34 Ch. D. 561; Grant v. Cameron, 18 S. C. R. 716; Smith v. Thorne, 18 Q. B. 142; Young v. Moore, 23 U. C. R. 151; Gemmell v. Colton, 6 C. P. 57;

In re River Steamer Co., Mitchell's Claim, 6 Ga. 822; Birkett v. Bisonette, 15 O. L. R. 93, 10 O. W. R. 171; Morgan v. Rowland, L. R. 7 Q. B. 493.

There will be judgment for the defendant on the point of law raised in the pleadings.

As it does not appear before me that the decision on this point of law substantially disposes of the whole action, I make no further order, but reserve to the defendant the right to move to dismiss the action, should he desire to do so and the circumstances warrant such motion.

SASKATCHEWAN.

NEWLANDS, J. APRIL 13TH, 1908.

TRIAL.

REGINA HEATING AND PLUMBING CO. v. GILLESPIE.

Contract—Work and Services—Installation of Heating Plant in House—Assignment of Contract by Contractor—Consent of Owner—Substantial Completion of Work—Acceptance—Guaranty — Temperature — Compliance with Contract—Extras—Breach of Contract—Counterclaim—Damages.

Action to enforce a mechanic's lien.

A. Casey, Regina, for plaintiffs.

J. F. Bryant, Regina, for defendant.

NEWLANDS, J.:—The facts are that the Smith and Fergusson Company entered into an agreement with defendant to put in a hot water heating plant in his residence on lot 14, block 432, Regina, according to certain specifications, for the sum of $740. The Smith and Fergusson Company went out of business and assigned the contract to the plaintiffs, who did the work under it. They also continued the heating plant to the attic or third storey of defendant's residence, for which they charged an additional sum of $168.

The first defence is, that defendant never consented to the assignment of said contract to plaintiffs. The Smith and Fergusson Company wrote defendant that they had assigned this contract to the plaintiffs. The defendant replied that he had never heard of this company, and could not ac-

cept a transfer until he knew more about those who were getting the contract. The Smith and Fergusson Company wrote in reply stating who were the members of the company. Afterwards Mr. Reid, the president of the plaintiffs, met defendant, and he says that defendant informed him that he was satisfied; defendant denies ever saying so. The plaintiffs then went on with the work, and defendant made no objection. From this evidence I find that defendant consented to the assignment of the contract.

The second defence is, that the contract was never completed, and, as it is an entire one, for a specified sum, plaintiffs cannot recover. From the evidence I think the work was substantially completed, and that defendant accepted the same. After defendant moved in, he made no complaint of any kind until he put in his defence to this action, and I therefore find that he accepted the same.

The third defence is, that by the contract there was a guarantee to heat the building to 70 degrees when the outside temperature was 40 degrees below zero. When this guarantee was given, a plant was to be put in as set out in the specifications. After that work was practically completed, at defendant's request the plaintiffs extended the plant to the attic or third storey, thus requiring an additional service from the heating plant. As this would naturally change the conditions, I do not think the plaintiffs would be liable on their guarantee. Apart from this fact, the defendant made no complaint, and plaintiffs were given no opportunity to test the plant to shew that it would comply with this guarantee. I, therefore, find for the plaintiffs on this issue.

The fourth defence is, that the contract was to heat the whole building, and that what is charged as an extra is part of the original contract. The contract was to put in a plant according to specifications. These specifications shew exactly what was to be put in and in what rooms. It does not provide for any of the plant to be put in the attic or third storey. The plaintiffs did not, therefore, by the original contract agree to extend the heating to that storey, and, as that was done at the defendant's request, they are entitled to charge for it as an extra, and I think the amount charged, $168, is a fair price.

As to the counterclaim, it was shewn that plaintiffs did not wrap the pipes in the cellar nor comply with the contract in one or two minor points. The evidence shews that

the work can be made in accordance with the contract for $50, and I therefore allow defendant that amount for damages.

There will be judgment for plaintiff for $858 and costs. If the amount of judgment and taxed costs be not paid within 30 days after entering of judgment, the judgment creditor may, after advertising said property for 3 weeks, sell the same.

YUKON TERRITORY.

CRAIG, J. APRIL 10TH, 1908.

TRIAL.

IRWIN v. KELLY.

Contract—Purchase of Interest in Mining Property—Payment of Money—Failure to Convey—Action to Recover Money Paid — Defence — Novation — Substitution of Debtor—Release—Absence of Writing—Statute of Frauds —Evidence.

Action to recover $500, money paid for the transfer of an undivided quarter interest in placer mining claim number 37 Sulphur Creek, upon the defendant's default to convey.

Frank J. McDougal, for plaintiff.

George Black, for defendant.

CRAIG, J.:—The facts are as follows. The defendant, Kelly, by an agreement made with one Alexander McDonald on 12th July, 1904, had the right to purchase the undivided half of the above-named claim, and had two years to complete the purchase. In the meantime, while operating the claim, he had to pay 10 per cent. of all the gold taken out, to the vendor. The plaintiff, Mrs. Irwin, approached the defendant to purchase a quarter interest, and on 17th December, 1904, as appears by the cheque given in payment of the purchase price, agreed with Kelly as follows—I give the agreement in full, it being very short: "35-A Sulphur, Y.T. Received of Mrs. Mary Irwin the sum of $500 for a quarter (¼) interest in 37 below on Sulphur Creek. Said $500 is payment in full for said quarter interest, and I will furnish a good and sufficient deed for the same upon demand. W. S. Kelly."

The money was paid over, and Mrs. Irwin says her understanding was that it was to be paid to McDonald on the agreement of purchase between Kelly and McDonald before mentioned. About 14th February following, Kelly, by an agreement of that date, agreed to sell to one Heydon a quarter interest in the said claim, payable by instalments provided for in the agreement, and in the agreement Heydon covenanted to pay $1,000 owing by Kelly to McDonald. Neither Kelly nor Heydon paid McDonald, and they were subsequently shut out by foreclosure proceedings.

The contention and the defence now set up is that, at the time of this last agreement, the plaintiff, Mrs. Irwin, was present and concurred in the sale and agreed to take Heydon in lieu of Kelly as the party to furnish her a deed. It is further sworn by Kelly and Heydon that, although the agreement of 17th December provided for a deed on demand, yet Mrs. Irwin was fully aware that Kelly could not convey to her until he had satisfied the agreement with McDonald and paid the $1,000, which might be in two years. Mrs. Irwin says she was not aware of it. What Kelly does set up now is that there was a complete novation at the time of the agreement with Heydon. The plaintiff is an ignorant, illiterate woman. Both Heydon and Kelly are men of more than ordinary intelligence, Heydon having studied medicine, and it appears is practising a little now, and is also a mining engineer. He had been the adviser of Mrs. Irwin before the time of the agreement and until lately, and he had her full confidence, having borrowed from her, at various times, all her savings which she had earned by her own labour, she being a cook at the time of this transaction. Kelly gave me the impression of being an astute, cautious man. As to their evidence, I am compelled to say that I have very little confidence in the evidence of any of them. Mrs. Irwin maintained stoutly that she did not understand the agreement between Kelly and McDonald, but thought she had a right to get a deed at once, Kelly and Heydon as strongly maintaining the contrary. She says she did not accept Heydon, but only was satisfied when Heydon purchased, as she thought he was a better miner than the other man. I think she was not always truthful, because I think her subsequent conduct indicated that she knew that Kelly could not give her a deed at once. At the same time I do not believe Kelly either, and I will detail why. Heydon was a very prosy but deliberate witness, measuring every word he uttered, but not always

giving his evidence clearly. He was a man who should have been able to give clear and positive evidence, but he appeared to me to cloud over at many times what he intended to say. I am quite certain that they were all together at the cabin at the time the Heydon sale was carried out, although Mrs. Irwin denies that. To constitute a complete novation there must be a mutual agreement between all the parties and all must concur in the same thing; not only that, but there must be a thorough understanding by all the parties of their position and the changed position. It must be clear, first, that there was a substitution of one debtor for another, and that the creditor not only accepted the new debtor, but released the old one, and that with full knowledge of all the circumstances. I think that Mrs. Irwin had a general idea that Heydon was taking over the property, and that it would depend upon his fulfilment of the Kelly agreement with McDonald whether she obtained her deed or not. But that she understood that she was releasing Kelly at the same time and taking Heydon as her debtor, I doubt. Reading from the reporter's notes of Heydon's evidence, speaking of the knowledge of Mrs. Irwin of the transaction, I cite the following:—

"Q. How did it come to her knowledge? A. I told her in the first place down at my cabin that the Kellys wanted to sell out to me, and that I was thinking seriously of buying them out, and I asked her what she thought of it, and she said she would rather have me for a partner than Kelly. Then afterwards when the agreements were drawn up before they were signed—" . . . .

"Q. What took place? A. I read this agreement over to Mr. Kelly and Mrs. Irwin, and it met with the approval of both, and Kelly signed. . . . .

Q. You stood in Kelly's place in all things? A. Yes; I took all his right, title, and interest, everything regarding that; Kelly stepped down and out and I stepped into his place.

Q. Who was to furnish Mrs. Irwin from that time on with her interest?

(Mr. McDougal objects to evidence varying or adding to the document in question.)

Q. Did you have any conversation with Mrs. Irwin in regard to her position as to this quarter interest she was to get in 37? A. She was to look—yes, sir, I did.

"Q. Where? A. When I first spoke of the sale from Kelly to me and during two or three conversations that were incidental made between. . . . .

"Q. Was anything ever said to her by you or by her to you in regard to who she was to look to for her quarter interest after you bought Kelly out?

(Mr. McDougal objects to question as leading).

"Q. At the time the agreement was signed between you and Kelly? A. At that time; we were all present together.

"Q. What transpired then? A. Mrs. Irwin's rights were unimpaired, but she took me instead of Kelly.

"Q. What was said to indicate that? A. I told her Mr. Kelly had stepped down and out, and I had bought all his rights in the matter and stood in his place.

"Q. What did she say? A. She said she was glad of it, that Morrison had confidence in me and she had confidence in me, and she would rather have me for a partner than Kelly, because she thought I would do better by the claim.

"Q. On any future occasion was anything further said by her to you in regard to who she looked to for her quarter interest? A. Subsequent conversations were frequent, and we always talked that she looked to me.

"Q. What was some of that talk? A. Parties had told her that Kelly had swindled her, that he had no right to sell that to her, and that she would never get her money.

By the Court—Q. When did she have this conversation with you? A. This was subsequent talk.

"Q. She was always discussing in the subsequent talk Kelly's wrong-doing in selling to her what he hadn't to sell? A. Yes.

"Q. Tell me why, if she took you, she ever discussed Kelly afterwards. She on the day of the agreement took you and released Kelly; why should she after that be complaining about Kelly not fulfilling his agreement? A. It was not complaining of that.

"Q. Why should she discuss him at all? A. Because she had it in for him. . . .

"Q. You said you had repeated conversations subsequent to this about the quarter interest? A. Yes.

"Q. Which she had to get from Kelly or from you? A. She had to get that quarter interest from one or the other.

"Q. Why did she keep harping on Kelly? A. She didn't do that; that was my mistake. . . . She always looked to me.

"Q. How do you know? A. She said—'I hold you to carry me through so that I won't lose my money.'"

Kelly in his examination for discovery does not always tell the same story which he tells afterwards on the trial. In the examination for discovery he says that the first mention of a release to him was in 1907, when he met her on the road, and she told him that she had sold her quarter interest to Heydon, and that she released him (Kelly). On the trial he speaks of a release given to him at the time of the sale to Heydon, and in his examination for discovery he says the reason he never gave a deed was because she never asked for it. Being asked this: "Q. In what words did Mrs. Irwin release you from your obligations contained in exhibit A, that is, the original agreement? A. She said she was very glad that the doctor had made the purchase. Q. Is that all? A. She felt sure that her interests would be safer, that he would complete the contract with McDonald." He does in his examination for discovery inferentially imply that she took Heydon instead of him. He says, "She consented to take him in my place."

On the face of the agreement between Kelly and Heydon and in the bills of sale which were given and placed in escrow under that agreement, there is an apparent change from "three-eighths" interest to "one-quarter." Kelly, being examined on this, fences a great deal, and finally admits that the change was made at his suggestion before the signing of the document. Kelly relates that in the spring of 1907 he met Mrs. Irwin on the road and she told him that she had sold out her quarter interest to Heydon, and that she had released Kelly. This is a remarkable statement when one considers the parties, and I do not believe it. Mrs. Irwin, as I said before, is an ignorant woman. If she had originally released Kelly and accepted Heydon, there was no need for her again to mention the fact that she had released Kelly, because, if the novation was complete at the time of the sale to Heydon, Mrs. Irwin had no further claim upon Kelly, and the form in which Kelly puts her statement is an unreasonable form to be employed by a woman of her degree of intelligence. I do not think she knows the meaning of the word "release," certainly not

the effect of a release such as these parties now seek to set up.

They further contend that she sold this quarter interest to Heydon afterwards and was paid her money on the sale. I will deal with that later on.

One may as a jury infer from the subsequent acts of the parties, under the authorities of Hart v. Alexander, 2 M. & W. 484, Hobson v. Cowley, 27 L. J. Ex. 205, what her mind was at the time of the transaction. The facts arising from her subsequent conduct which affect Mrs. Irwin are that she did not pursue her remedies sooner. In answer to that it may be said that she was aware, although she denies it, that a deed could not be obtained from McDonald until the payments were made, and that two years were allowed for that, also that Kelly had gone away from the neighbourhood for some time, and that she was to a certain extent relying upon Heydon to carry out the McDonald agreement and obtain the deed. The other acts which are against the defendant's contention are much stronger. Heydon and Kelly are both intelligent men. Heydon appears to be the local conveyancer; he has a typewriter; the agreement between him and Kelly is a typewritten document. On every other occasion written documents are taken. There is not a scrap of paper to indicate the change in the position of the parties. Mrs. Irwin was present, according to their story, and could have easily signed a simple assent to the transaction and an acceptance of Heydon and a release of Kelly. Nothing of that kind took place. Kelly guards himself as against the payment of McDonald by Heydon by a special covenant. He does not take any covenant from Heydon that he will protect him as against Mrs. Irwin and fulfil his covenant to convey to her? In answer to my question he said that at the time of the Heydon and Kelly agreement the old agreement with Mrs. Irwin was there and produced. When asked why it was not given up to be cancelled, he tried to hedge by saying perhaps it was not there. Again, the conveyance and agreement with Heydon only provides for a quarter interest. Kelly held a half interest. He had previously agreed to convey to Mrs. Irwin a quarter interest. He did not give Heydon a proper transfer so as to enable him to obtain the complete title from McDonald and thereby to re-convey the quarter interest to Mrs. Irwin. The conveyance or bill of sale put in escrow to effectuate the agreement was made out, not to Heydon,

but to a Mrs. Smith, who appears to be a sister of Heydon living in Honolulu. No written precautions were taken, and Mrs. Irwin, even if the novation had been complete by agreement, was powerless, I think, to enforce that agreement against Heydon afterwards.

It has been held, and is good law, that such a novation agreement, when there is a release of the original debtor, does not require to be in writing, not coming under the Statute of Frauds. But I think the Statute of Frauds does apply. To create a complete novation, the substituted agreement must be such a one as the creditor can enforce against the new debtor. Of course, the question whether the parties have intention to novate in a given case is one of fact, as I have already said, and it may be inferred from all the circumstances of the case. But the burden of proof is entirely on the party alleging the novation. In 21 Am. & Eng. Encyc. of Law, p. 671, it is said: "To constitute a complete novation there must be an extinguishment of the prior obligation and an acceptance of the new debtor." Here it may be asked, what consideration passed to Mrs. Irwin for the acceptance of a new debtor? There must be some consideration, or it is a nudum pactum. Of course any consideration will do, but there must be some consideration, and none is shewn to me, except that Mrs. Irwin had some confidence in Heydon and trusted in him, that she would rather have him as a partner in the claim than Kelly. But is such a preference as that a consideration which will remove the contract from being a nudum pactum. I doubt it. I quote from 21 Am. & Eng. Encyc. of Law again, p. 673, where it says: "It is essential in every case of novation that the resulting obligation be a valid and enforceable one. Although there may be present competent parties and sufficient consideration, the prior obligation is not extinguished unless the new obligation be such as may legally take its place. Thus, if it be inchoate or lacking in some necessary element, or illegal and therefore unenforceable or conditional, novation either fails entirely or is suspended until the objectionable element in the contract is removed." And the same principle is emphasized in Pollock on Contracts, also Leake, p. 689. Such a contract of novation, if the original contract for which the new one is substituted requires to be in writing under any statute, should also be in writing. Both Kelly and Heydon state that the agreement with Mrs. Irwin originally and the substituted agree-

ment were not to be performed for two years. There was some doubt as to whether it was determined that it should not be performed for two years or whether it might not be performed for two years. If it was not to be performed within two years, then the Statute of Frauds applies, and it should be in writing as well as the substituted agreement. But I will not dwell upon that point, not being sure as to the evidence. But certainly the contract was one relating to an interest in land, and upon this point I would cite the cases of Stussi v. Brown, 5 B. C. R. 380; Fero v. Hall, 6 B. C. R. 421; also Barringer and Adams on Mining, p. 338, and McPherson & Clark on Mining, p. 61, and the case of Dale v. Hamilton, 5 Hare 369, and Chaddick v. Skidmore, 27 L. J. Ch. 153.

To enable Mrs. Irwin to recover from Heydon, therefore, the substituted or novation agreement should have been an agreement in writing; not being effectual in law to entitle her to recover, I do not think it was a complete and legal novation.

Another defence raised is that Mrs. Irwin sold out to Heydon and was paid. The evidence on this point is that Kelly says she told him she had sold to Heydon, and Heydon himself says he purchased and afterwards paid. He does not get a scrap of paper to shew any such transaction. He was most careful in all his own transactions to take conveyances, but when he purchases and pays for a piece of property he has nothing whatever to shew for it. More than that, he gives her a statement of the various sums which he owes her, and admits that in this statement there should have been this sum of $500 which he says he paid for this claim, as a liability. It does not appear anywhere in either statement rendered by him, either in the face of the original document or account, or upon the back of it, where he repeats his liabilities. He can give no explanation as to why he omitted this. There is no doubt he did pay her $1,000, $500 of which he says he applied, with her knowledge, on the payment of the purchase of this quarter interest. She denies this. He did owe her $1,000, which he paid her and which was derived from the sale of another claim. She had at the time a claim against the owner of the property for wood for $900 and $100 for representation, making the complete $1,000. Her husband swears that he had some interest in the property, and would not consent to the sale unless the whole $1,000 was applied on the debt

owing to his wife, the plaintiff, being $900 for wood and $100 for representation. This confirms her statement that the $1,000 was paid for the wood, and that no part of it was applied on the purchase of the quarter interest. Heydon further said he had a lay from Mrs. Irwin, and that certain moneys were given to her out of the product of the gold, and that he owed her this money at the time of the rendering of this statement, but neither does that appear upon this statement of liabilities.

Upon the onus of proof the law is very, very strong, as to its being thrown entirely upon the party seeking to allege novation. The case of Earl of Darnley v. London and Chatham R. W. Co., L. R. 2 H. L. 43, is a strong case. I read from the head-note: "Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly shew, not merely his own understanding as to the new terms of the arrangement, but that the other party had the same understanding."

Upon the whole case I would refer to the following authorities: Liversidge v. Broadbelt, 28 L. J. N. S. Ex. 332; Hobson v. Cowley, 27 L. J. N. S. Ex. 205. A case very similar to this one in principle and conclusive upon many of the points raised is the case of Goss v. Lord Nugent, 5 B. & Ad. 58, 39, R. R. 392. I think this case settles the admissibility of oral testimony to prove a new and substituted contract when the original contract is in writing, and is required to be in writing under the Statute of Frauds.

There is, of course, a great conflict of testimony as to what the real understanding was in this case, but nowhere in the evidence of Heydon nor in the original evidence of Kelly on examination for discovery is there any positive statement that Mrs. Irwin actually and ex animo released Kelly, when she understood that she had to look to Heydon for her deed. Supposing that she had to look to Heydon, that of itself would not constitute a novation unless she looked to him, at the same time having the mind to release Kelly and not to look to him. I am sure that Kelly and Heydon at the time did not fully understand what the legal requirements of novation were, and my impression is that, having afterwards discovered what they should have done, they now seek to bolster up a defective novation by some attempt at giving evidence of it, and still they are not clear

in their evidence. I am against them on the facts, because this woman is ignorant and was in the hands of two intelligent men, who had the means of writing what the agreement was; and the fact that there were no writings satisfies me that the parties did not comprehend their rights at the time and did not see the necessity of taking any release of Kelly. I am not satisfied that Mrs. Irwin comprehended—in fact I believe that she did not comprehend—the nature of the transaction, and that she drifted along quite content to take her deed from anybody who would give it to her. There is also the other fact that Kelly only conveyed a quarter interest to Heydon, reserving to himself the other quarter, being of course the quarter which he had previously agreed to convey to Mrs. Irwin.

The form of the statement of claim is somewhat defective in not setting out the true facts, but from all the pleadings and from the evidence these facts have been ascertained, and if any amendment is necessary, it can be made, but I do not think it is necessary.

I am against the defendant because he has not satisfied me at all that there was a novation, that Mrs. Irwin understood that there was a novation, and that she released him, and I do not believe that she sold to Heydon or that she has been paid. I think there has been a misunderstanding, because she agreed to sell him what was known as second bedrock for $1,000.

There will be judgment for the plaintiff for $500 and costs.

THE

Western Law Reporter

VOL. VIII. TORONTO, MAY 15, 1908. No. 2.

MANITOBA.

MACDONALD, J. APRIL 6TH, 1908.

SINGLE COURT.

TRADERS BANK OF CANADA v. WRIGHT.

Injunction—Interim Order—Action on Behalf of all Creditors—Injunction Restraining Debtor from Transferring his Property before Judgment.

Motion by plaintiffs for an interim injunction.

The plaintiffs sued the defendant Archibald Wright for $100,000 on a guaranty executed by him and others, under which they secured the credit of the Ideal House Furnishing Co. to that extent. At the time of becoming guarantor the defendant Archibald Wright represented his financial strength at $316,000, principally made up of stock in several joint stock companies, $80,000 of which was stock in the Tuxedo Park Co. The plaintiffs made a demand upon the defendant Archibald Wright for security for his liability under the guaranty mentioned, when he replied that he had nothing to give as security, and that he did not then possess the stock represented as owned by him at the time of the giving of the guaranty.

Upon investigation the plaintiffs discovered that the defendant Archibald Wright had parted with some of the stock referred to, and that $80,000 of stock held by him in the Tuxedo Park Co. had been assigned by him to his wife, his co-defendant. The plaintiffs sought to restrain the defendants from disposing of the stock so held by them, and alleged that the assignment from defendant Archibald Wright to his wife was made with the intent and design of defeating, delaying, and hindering the plaintiffs and his other creditors

in the recovery of their debts, and further alleging that the transfer was without valuable consideration.

G. D. Minty, for plaintiffs.

W. R. Mulock, K.C., and J. W. E. Armstrong, for defendants.

MACDONALD, J.:—It is objected on behalf of the defendants that the Courts cannot restrain a man who is alleged to be a debtor, from parting with his property, and Robinson v. Pickering, 16 Ch. D. 660, is authority for that contention. That case, however, was not on behalf of plaintiff and other creditors, and it seems well settled that where a creditor brings his action to set aside a fraudulent conveyance without first having a judgment, he must issue his writ on behalf of himself and other creditors: Parker on Assignments, p. 207. The plaintiffs herein sue on their own behalf and that of other creditors.

Considering the fact that in October, 1906, the defendant Archibald Wright had assets shewing a net surplus of over $300,000, the fact that he told the plaintiffs' representative that he had nothing which he could give as security, and that he transferred $80,000 of the Tuxedo Park Co. stock to his wife a few months ago, and the fact of his wife having entered action against him for a money demand, are circumstances so suspicious as to lead me to the inference that the intention of the defendant Archibald Wright is (by transferring his property) to hinder and defeat his creditors, and I think a proper case is made out for an injunction restraining him from making further transfers of his property, and his co-defendant from re-transferring the Tuxedo Park stock now held by her under assignment from her husband, pending the trial of this action.

MANITOBA.

APRIL 13TH, 1908.

COURT OF APPEAL.

McMANUS v. WILSON.

Summary Judgment—Money Demand—Action by Assignee of Claim — Defence — Set-off or Counterclaim against Assignor—King's Bench Act, sec. 39 (f)—Independent Cause of Action—Unliquidated Damages.

The defendant had entered into an agreement with one Walton, whereby defendant agreed to purchase from Walton

certain land for the sum of $2,040. There remained unpaid $1,200 of this purchase money, besides interest. Walton assigned the agreement to the plaintiff, who brought this action to recover the amount. The defendant filed a defence, in which he alleged that at the time of the assignment Walton was largely indebted to him "in respect of moneys and claims aggregating a sum largely in excess of the amount sued for herein, and not less than the sum of $3,000, which the defendant would have been and was then entitled to set up by way of defence or counterclaim to or set-off against any demand or claim which said Walton might or could have made against the defendant in respect of the moneys sought to be recovered in this action;" and he alleged that the plaintiff, as assignee of Walton, took the assignment subject to the rights of the defendant in respect of such defence, counterclaim, and set-off. Then, by way of counterclaim, he repeated the foregoing allegations and counterclaimed against the plaintiff for the amount sued for in this action.

There is nothing in the defence to indicate how the defendant's claim arose, or to shew whether it was liquidated or unliquidated damages, or whether it arose out of or was connected with the transaction referred to in the agreement.

The plaintiff moved before the Referee for a summary order for leave to enter final judgment. The Referee refused to make the order, and an appeal to a Judge in Chambers was dismissed by MATHERS, J. The plaintiff then appealed to the Court of Appeal.

J. E. O'Connor and H. P. Blackwood, for plaintiff.

R. G. Affleck, for defendant.

The judgment of the Court (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—On the motion before the Referee the defendant had filed an affidavit alleging that Walton was indebted to him to the amount of $3,000, and claiming the right of set-off, but not shewing in any way how this indebtedness arose. He was examined at great length upon this affidavit, and then stated that his claim against Walton was in respect of sales of stocks in certain companies which were made by Walton to the defendant. The defendant stated that Walton had represented the stocks to be worth the amount paid for them, while as a matter of fact they turned

out, as he alleged, to be worthless. The examination clearly established that the sale of the stocks was in no way connected with the transaction referred to in the agreement sued upon.

The claim, if any, which the defendant upon his own shewing had against Walton was one for unliquidated damages. The question therefore arises, can the defendant set up as against the assignee a set-off by way of counterclaim for damages arising out of a separate transaction which the assignor, which was not at its inception, and which never became, connected in any way with the claim assigned?

Section 39 (f) of the King's Bench Act makes provision for the right of set-off by the debtor as against the assignee. The enactment is in the following words:—

"In case of any assignment of a debt or chose in action arising out of contract, and not assignable by delivery, such assignment shall be subject to any defence or set-off, in respect of the whole or any part of such debt or chose in action arising out of contract, existing at the time of the notice of assignment to the debtor or person sought to be made liable, in the same manner and to the same extent as such defence or set-off would be effectual in case there had been no assignment thereof; and every such defence or set-off shall apply as between the debtor and any assignee of such debt or chose in action arising out of contract."

Under the above provision, anything which the debtor could avail himself of as an equitable set-off to the debt assigned would be a defence to which the assignment would be subject: per Osler, J., in Exchange Bank v. Stinson, 32 C. P. 158. The corresponding provision in the English Judicature Act declares that the assignment of a chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." That is to say, the assignment shall be subject to all equities which would be enforced in a court of equity in favour of the debtor: see Young v. Kitchen, 3 Ex. D. 130.

Now, a counterclaim by a defendant for unliquidated damages, arising out of a wholly independent cause of action in no way connected with the claim assigned, is not a defence or set-off such as would at any time have been recognized in a court of equity. Equity would allow a set-off, in the case of independent transactions, where from the circumstances of the case it appeared that the party incurring the second

debt acted in reliance on the former debt as a means of discharging it. "This is sometimes expressed by saying that, though the debts are independent, the credit is mutual:" Smith's Equity, 3rd ed., p. 547. That, however, is not the present case. I can find no authority for carrying the principle of set-off as far as the defendant now seeks to carry it.

In Government of Newfoundland v. Newfoundland R. W. Co., 13 App. Cas. 199, the government was held entitled to set off a counterclaim for unliquidated damages for the railway company's breach of contract in not completing the line, as against the assignees of a claim of the company against the government for a subsidy covenanted to be paid to the company under the same contract. The ground upon which that decision was based was that the two claims under consideration had their origin in the same portion of the same contract, where the obligations which gave rise to them were intertwined in the closest manner. This case was decided in the year 1888, and the laws of Newfoundland which applied to the case contained the same provisions respecting counterclaims for unliquidated damages as are contained in the English Judicature Act. In giving the judgment of the Privy Council, Lord Hobhouse stated the law in England upon the subject in these words: "Unliquidated damages may now be set off as between the original parties, and also against an assignee, if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment."

In the present case no pretence is made that the subject matter of the counterclaim arose out of the agreement upon which the assignee is suing. The law of set-off should not be extended so as to permit a defendant to set up against the assignee of a debt a counterclaim for unliquidated damages wholly unconnected with the transaction out of which the debt arose, a counterclaim which is in fact an action of damages against the assignor in respect of a totally distinct matter, one which the defendant would seek to have tried in the absence of the party who should be called upon to answer it. If the principle of set-off were carried to that extent, no one could safely purchase a mortgage, a bond, or any chose in action. He would be liable to have his claim as assignee defeated by a counterclaim for damages alleged by the debtor to have been suffered by him at the hands of the assignor in respect of some other extrinsic matter wholly unknown to the

assignee, one against which he is not in a position to defend himself.

For these reasons, I am of opinion that the defendant's set-off and counterclaim cannot be raised as against the present plaintiff. Outside of this, the defendant does not shew a scintilla of a defence to the action. I think the appeal should be allowed and an order made permitting the plaintiff to sign final judgment for the debt, interest, and costs, including the costs of the motion before the Referee and Mathers, J., and of this appeal.

MANITOBA.

APRIL 13TH, 1908.

COURT OF APPEAL.

CHARREST v. MANITOBA COLD STORAGE CO.

Negligence — Bailment—Perishable Goods — Injury to, by Negligence of Bailees — Defective Storage Plant — Improper Operation—Warehouse Receipts — Stipulation as to Liability—Defects in Wrappers.

Appeal by plaintiffs from Judgment of DUBUC, C.J., 6 W. L. R. 762.

The appeal was heard by HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.

H. W. Whitla and W. J. Chandler, for plaintiffs.

C. P. Wilson, for defendants.

HOWELL, C.J.A.:—The learned Chief Justice found the following facts:—

1st. That the meat was in good and in sound condition when it left the plaintiff's premises and was delivered at the defendants' warehouse.

2nd. That the defendants had a properly constructed warehouse for the purpose of cold storage; that their plant is a first-class cold storage plant of modern type, and of sufficient power for the business intended to be done by the same.

3rd. That the said plant was operated with the ordinary and reasonable care which might have been expected in the carrying out of the said business.

4th. The men in charge of the plant had not the higher and special knowledge which a man of scientific attainment might possess on the subject; but they had sufficient practical and even technical knowledge which might be reasonably expected to conduct such a business in an ordinary satisfactory manner.

When the meat was delivered to the defendants, two cuts were placed together and paper put on top and bottom, but apparently not on the sides, and a wrapping of coarse bagging material covered over all.

The learned Chief Justice found that more freezing would be required when so wrapped, and at the trial the defendants undoubtedly tried to prove that this wrapping prevented the quick freezing and thereby helped to cause deterioration. The Chief Justice, however, held that seeing the meat come in for the purpose of being frozen in that state, it was their duty to know their business and to call attention to the condition of the wrapping, and that by receiving the meat so wrapped the defendants impliedly understood to freeze and keep it frozen.

The learned Chief Justice, however, held that if the damage was caused because of the wrapping, the defendants were not liable on account of an exception in the warehouse receipt.

With great deference, I cannot agree that the condition in the warehouse receipt relieved the defendants. The taking of the meat to be frozen, wrapped as it was, created a representation that the warehouse was fit and had the appliances for freezing the meat and for keeping it frozen in a reasonable manner for preserving it: Maori v. Hughes, [1895] 2 Q. B. 555.

If the defendants seek to rid themselves of a legal liability by an exception in a warehouse receipt prepared by themselves, they must shew the exception in clear and unambiguous language: Waikato v. New Zealand, [1899] 1 Q. B. 56. The condition or exception is read strictly, and if the damage is really caused by the defendant's neglect, although arising out of a state of facts protected by the condition, the bailee is liable: Gill v. Manchester, L. R. 8 Q. B. 188. The exception in this case relates only to damages caused by

defect of wrapping. The defendants do not claim a defect in the wrapping, but say the meat should not be wrapped in any way. I do not think the defendants can gain any advantage from the form of the warehouse receipt. If the deterioration was caused by the defendants not having the appliances or skill to freeze and keep frozen the meat so wrapped, I think they are liable.

The finding is that one or two degrees more of frost would be required for freezing meat so wrapped, compared with meat not wrapped; but, once frozen, I should think that certainly no lower temperature would be required to keep it frozen; but rather the contrary.

At the beginning of the judgment the following language is used: "The real cause of the deterioration of the meat has not been satisfactorily shewn or explained;" and at the end this is stated: "In my opinion, the true cause of the deterioration of the meat has not been disclosed by the evidence;" and the action was dismissed.

Now what is meant by the third finding? At the trial the defendants called witnesses to shew how the plant was operated, and the temperature that was maintained, and that other meat received from other persons, stored in the same compartments at the same time as the plaintiffs', came out in good condition, and the whole effort of the defendants at the trial was to shew that there was no negligence on their part. Looking at the evidence and points in dispute, it seems to me that the finding really was that the defendants performed the duties they assumed, and were not guilty of negligence. A careful review of the evidence convinces me that sitting in appeal I should not reverse the findings of fact of the trial Judge.

A bailee for hire is not an insurer, but he must exercise the care which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character, and if peculiar skill is required in the performance of the duties, he and his employees must possess and use that skill: Lincoln v. Gay, 164 Mass. 537. "He must exercise the same degree of care towards the preservation of the goods intrusted to him from injury which might reasonably be expected from a skilled storekeeper acquainted with the risks to be apprehended." Brabant v. King, [1895] A. C. 632.

The onus is on the plaintiffs to prove negligence, but the authorities are clear that if it is shewn that the goods were in a sound condition when delivered to the warehouseman, and he returns them in a damaged condition without explanation, there is evidence of negligence.

Assuming, then, that in this case the goods were in a sound condition when placed in the custody of the defendants, there is a prima facie case made out for the plaintiffs, but the learned Chief Justice has found that the warehouse and plant were properly constructed and properly operated for the purposes of freezing and keeping the meat frozen, and that the defendants used due care and skill in that behalf and were not negligent, but the meat was, after some months, found to have deteriorated, and was unfit for food, and the real cause of the deterioration has not been disclosed by either side.

The bailee, even if insurer, is not liable if the damages arise from an intrinsic principle of decay naturally inherent to the commodity, or, as Story states the law in his work on Bailments, sec. 492, there is no liability arising out of loss because of "inherent natural infirmity and tendency to decay:" Blower v. Great Western R. W. Co., L. R. 7 C. P. 655.

There was evidence, and common knowledge tells us, that if fresh meat is frozen and kept frozen, the freezing will arrest the tendency to decay and preserve the meat for a long time fit for human food, and it seems difficult to say what caused the damage in this case, on the above finding of facts.

The learned Chief Justice found that the meat, when it reached the warehouse of the defendants, "was in good and in sound condition." It might have been "good and sound" for human food, and yet have been slaughtered for so long a period that a certain decay or fermentation had set in, which freezing in the ordinary way would not immediately arrest, and the deterioration may have been caused by "inherent natural infirmity and tendency to decay," and this theory may be as probable as the inference that the defendants were negligent in freezing or keeping it frozen.

Taking the above findings of fact, it seems to me the plaintiffs have not proved by evidence or inference of fact that the defendants were guilty of negligence.

The appeal is dismissed with costs.

PHIPPEN, J.A., concurred.

PERDUE, J.A. (dissenting):—The plaintiffs are butchers carrying on business in the city of Winnipeg. The defendants operate in the same city a cold storage warehouse provided with machinery and apparatus for cooling the store rooms and for freezing poultry, game, or meats, and keeping them frozen for their preservation. The plaintiffs, from time to time during the months from August to November in the year 1906, delivered to the defendants quantities of fresh beef in packages, for the purpose, as they allege, of being frozen and kept for them in that condition until called for. When each consignment of meat was received, the defendants gave a warehouse receipt, in which they undertook to keep the goods separate from other goods and to deliver them pursuant to the order of the plaintiffs, to be indorsed on the receipt, on payment of storage and other charges, subject to certain conditions, of which the following only need be quoted:—

"(a) The company are not responsible for any loss or damage caused by irresistible force, unavoidable accident (except as covered by insurance by the company), leakage, shrinkage, vermin, etc., or through depreciation from inherent defects, or from defects in the packages, barrels, wrappers, or coverings in which the said goods are contained, or from any defect in the manner in which the same are put up, or from lack of any special care or precaution by the company, or through change of temperature owing to the refrigeration plant or any part thereof becoming unworkable or being out of order."

Although nothing is said in the warehouse receipt as to freezing the goods, there was, nevertheless, an implied obligation that the meats delivered would be properly frozen, and then kept in a frozen condition. This must have been in the contemplation and intention of the parties. Fresh meat, if stored unfrozen in an ordinary warehouse, would soon spoil and become worthless. But the same fresh meat, if frozen while still fresh and sound, and kept frozen, will come out fresh and sound after the lapse of many months. This is a well known fact, and there was evidence in this case supporting it. We must, therefore, assume that the defendants undertook to freeze the meat without delay and to keep it frozen until called for. They also impliedly warranted that their warehouse and plant was sufficient for the purpose. Upon the question of the implied obligation on the part of

the defendants in a somewhat similar case, I would refer to Maori King v. Hughes, [1895] 2 Q. B. 554.

The trial Judge has found, and the evidence clearly establishes, that the meat was in good and sound condition when it was delivered at defendants' warehouse. If then it had been promptly frozen and kept frozen, it would have been still good and sound when it was examined some months afterwards. Instead of being in that condition, it was, when examined at defendants' warehouse in the following April, found to be badly tainted, mouldy, and unfit for human food. It was condemned by the city health inspector, and was destroyed. To sum up briefly, the meat was fresh and free from taint when delivered to defendants; if it had been frozen and kept frozen, it would have been in like condition in the following April; but when examined in that month it was found to be tainted and spoilt. In such a case res ipsa loquitur, and negligence must be presumed against the defendants: Kearney v. London, Brighton, etc., R. W. Co., L. R. 5 Q. B. 411, affirmed on appeal, L. R. 6 Q. B. 759; Scott v. London and St. Katharines Dock Co., 3 H. & C. 596; Curran v. Midland Great Western R. W. Co., [1896] 2 Ir. 183.

To answer this presumption of negligence the defendants raised three contentions: (1) that the condition in the bill of lading above cited absolved them; (2) that the manner in which the meat was packed and covered up by the plaintiffs prevented it from freezing; (3) that defendants were only bound to use ordinary care, and that the trial Judge had found that they had done so.

The first contention was practically abandoned upon the argument of the appeal, and, for the reasons more fully set out in the judgment just delivered by the learned Chief Justice of this Court, the contention cannot be supported. Much of the argument of counsel was devoted to the second contention. The plaintiffs had made the beef up in packages. Two loins of beef were placed one on top of the other, a sheet of paper was placed on the upper side and another on the under side, and they were then sewn up in burlap or loose sacking. This was done to keep the meat clean. It was contended that this had the effect of retarding the freezing, and was the cause of the injury. The evidence seems to shew that this wrapping of the meat would retard freezing

to a certain extent. The trial Judge found that it would require one or two degrees more of cold than unwrapped meat. One witness of very great experience stated that the difference between meat that was wrapped and meat unwrapped, as to the capacity for freezing it, would be much the same as the difference between unplucked and plucked poultry. If the difference was no greater than that, then the defendants' freezing apparatus should have been sufficient to have frozen the meat, packed and covered as it was. It should have been sufficient to freeze unplucked poultry and game, a very usual class of business. But, whatever the effect of the wrapping may have been as to the temperature required, the manager of defendants' warehouse received the meat so wrapped up, and raised no objection to it being in that condition. I think the defendants undertook to freeze the meat so covered and made up in packages, and, if a greater degree of cold was to be applied in such a case, they undertook to apply it.

In considering the third contention—that defendants were only bound to use ordinary care—I must again refer to the actual contract between the parties. This, as I have above pointed out, contained as one of its terms an obligation on the part of the defendants that the meats delivered by the plaintiffs would be promptly frozen and would be kept frozen until they were removed. This obligation, although implied, is just as binding as if it had been inserted in writing in the warehouse receipt: Maori King v. Hughes, supra, p. 555. The bailees were bound to perform their contract with regard to the work to be done, and if, through their failure to perform this contract, the goods are rendered useless, they are liable for the loss. Where a person enters into a contract to freeze meat or game and keep it stored and frozen, he must carry out the terms of his undertaking, even if it involves him in a greater liability than the ordinary warehouseman incurs. "If the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed:" per Blackburn, J., in Harris v. Great Western R. W. Co., 1 Q. B. D. 530.

The learned trial Judge found that defendants' plant "was operated with the ordinary and reasonable care which might have been expected in the carrying out of the same

business." Without accepting that as a proper finding upon the evidence, I would say that the finding, even if a true one, does not, in my opinion, go far enough to absolve the defendants. Ordinary and reasonable care may be all that is expected from the defendants in the usual classes of warehousing, but in the present case they undertook to freeze the plaintiffs' meat and keep it frozen while in their possession. If they failed to do this, they are liable for the damage caused by their negligence. That they used ordinary and reasonable care in the general performance of their business is no answer to the plaintiffs' allegation that they failed to do what they undertook to do.

Bailees for hire are under a legal obligation to exercise the same degree of care towards the preservation of the goods intrusted to them from injury, which might reasonably be expected from a skilled storekeeper acquainted with the risks to be apprehended; and that obligation includes, not only the duty of taking all reasonable precautions to obviate such risks, but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred: Brabant v. King, [1895] A. C. 640.

Applying these principles to the present case, it was the duty of the defendants, upon receiving for storage such a perishable article as fresh meat, to see that it was at once thoroughly frozen and then to keep it in that condition. This was a legal obligation imposed upon them as soon as they received the meat for the purpose of storage. Anything short of a compliance with this legal obligation would be negligence.

The manner in which the warehouse was conducted, and the treatment which the meat in question received, are matters wholly within the knowledge of the defendants and their servants. The plaintiffs, therefore, can only point to the result, that their meats, which if treated as agreed would have come out sound, have come out completely spoilt. The presumption of negligence which by the very facts must be imputed to the defendants can only be rebutted by sufficient evidence that they did what was required of them, or that the loss was occasioned by some cause for which they are not responsible.

The suggestion that the meat was unsound when it was received, or that there was some inherent defect in it, is

unsupported by the evidence, and is, in fact, quite the opposite of what was proved. The meat was proved to have been sound and free from taint when it was delivered to defendants. It was not delivered all at once, but in some 9 consignments, extending from August to November. Several of these consignments were delivered at a period of the year when fresh meat is little liable in this climate to become tainted. Yet all of them alike went bad. The possibility of some inherent defect being present in all these consignments alike is most remote. It is contrary to the evidence, and is in itself highly improbable.

After a careful consideration of the evidence, I have come to the conclusion that the damage was caused by the defendants' failure to keep the rooms where the plaintiffs' meats were stored at a sufficiently low temperature to freeze them thoroughly. Gallagher, an expert in this class of business, stated that the temperature should not go higher than 15° in the fall of the year, and that it should not remain long at 25° to keep the meat in good condition. Guest, another expert, stated that meats should be kept at 20° to 23°. The evidence of these witnesses was not contradicted. A number of log sheets were put in containing the temperature of the rooms at various times while the goods in question were in store. The record was by no means complete, but it shewed that the temperature was higher during the fall months than was consistent with safety, in view of the evidence of Gallagher and Guest. A butcher named Lauzon, on 1st November in the same year, stored a quantity of meat in the same rooms, and this came out in good condition. This meat was not wrapped in any way. It may be that the 2 or 3 degrees more of cold which the plaintiffs' meat would require, by reason of its being covered, exhausted the margin of safety, and that it went bad while the unwrapped meat was saved. In this view, the defendants were at fault in not keeping the rooms cold enough to save the plaintiffs' meats.

I regret that I have to differ from the rest of the Court in arriving at this view, but it is the only conclusion that commends itself to my mind. I think the appeal should be allowed and a verdict entered for $617.89.

Appeal dismissed; PERDUE, J.A., dissenting.

MANITOBA.

APRIL 13TH, 1908.

COURT OF APPEAL.

CARBERRY GAS CO. v. HALLETT.

Contract—Illegality—Sale of Acetylene Gas — Gas Inspection Act—Certificate of Inspector—Posting up—Testing Place—Connections—Non-compliance with Requirements of Act—Prohibition of Sale—Protection of Public—Local Inspector.

County Court appeal.

The plaintiffs supplied acetylene gas to customers in the town of Carberry. The Department of Inland Revenue had not prescribed a testing place in Carberry, pursuant to sec. 34 of the Gas Inspection Act, R. S. C. 1906 ch. 87.

No inspector had been appointed specially for Carberry, but the inspector at Winnipeg had jurisdiction there. The plaintiffs brought this action against the defendant, one of their customers, to recover the price of gas supplied to him. The defendant believed that he had been charged for a much greater quantity of gas than he had consumed, and, being unable to test the fact, other than through the readings of the plaintiffs' tested gas meter, through which gas was supplied, and with the correctness of which he was not satisfied, he set up the defence that, under the provisions of the Gas Inspection Act, the sale of the gas to him was illegal, and its price could not be recovered.

RYAN, CO. C.J., held the plaintiffs entitled to recover. The defendant appealed from that decision.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

D. A. Stackpoole and L. J. Elliott, for defendant.

J. D. Hunt, for plaintiffs.

RICHARDS, J.A.:—The defendant relies on the fact that the company have not, pursuant to sec. 44 of the Act, posted up in their office the certificate of the inspector, as

provided by that section. He further relies on the fact that the company have made no connections, to carry gas from their gas house to a testing place, as provided by sec. 34.

Section 34, after enacting that a testing place shall be prescribed by the Department in every place in respect of which an inspector is appointed, says that, "upon notice of the determination as to the location of such testing place, every undertaker shall make the connections necessary to carry the gas from such gas house, or premises, to such testing place; and until such connections have been made to the satisfaction of the inspector, the selling of gas shall be illegal."

Section 44 requires every undertaker to keep the public informed as to the quality and nature of the gas supplied by him "by procuring a certificate from the inspector, and posting it up in the chief office of the undertaker from time to time," as specified by that section.

Section 59 enacts that every undertaker who fails to procure and post up such certificate shall incur a penalty of $10 for each day during which such failure continues; and sec. 60 imposes a penalty of $50 a day for selling gas before connections have been made with the testing place, "as provided by this Act."

There is some doubt whether the Act was intended to apply to an undertaker supplying acetylene gas.

But, assuming for the sake of argument that it does so apply, I am of opinion that nothing has been shewn in this case that would deprive the plaintiffs of the right to be paid for the gas in question.

It has been held in a number of cases that where statutory requirements are made compulsory in the manufacture of goods, and recurring penalties are imposed for the non-compliance with such requirements, the price of goods made in violation of those requirements cannot be recovered from a purchaser to whom they have been sold.

Those cases are upheld on the inference of law that a thing so prohibited may not be sold; but they seem to me to have no application to the present case, for the following reason.

Sections 34 and 44 are enacted to carry out the one purpose of protecting the public, by providing that the gas to be supplied them by the undertaker shall be of a

proper quality, and that the public shall be able to see for themselves that it is of such quality.

The testing of the gas by the inspector is to ascertain its quality. Section 34, which provides for a testing place for that purpose, only requires the undertaker to make the connections with the testing place after notice of the determination of the Department as to the location of the testing place. There having been no testing place provided at Carberry, I do not see how the company can be in default on the question of connections. They clearly could not make such connections until the testing place was settled on and notice given them of the fact. Though sec. 34 says that until the connections are made the selling of gas shall be illegal, I take that to be subject to the earlier part of the section, and only to mean that the selling of gas shall be illegal after notice of the location of the testing place and until the connections are made.

If sec. 44 did not exist, then there could be no reasonable doubt that the selling of gas before the providing of the testing place, and its notification to the undertaker, would not be illegal.

Section 44 provides for the procuring and posting up of the certificates of tests. But it contains no express provision that non-compliance with its terms shall make illegal the sale of gas during the continuance of such non-compliance.

As the two sections (34 and 44) relate to the one thing (the protection of the public as to the quality of the gas supplied by the undertaker), they should, I think, be read together. If secs. 59 and 60 had not been enacted, the only time during which the sale of gas would be prohibited would be during the period after the undertaker had notice of the location of the testing places and until he connected his mains with the same, as required by sec. 34.

Then the question arises whether, in spite of the expressed legislation as to the illegality of selling contained in sec. 34, any further intention of Parliament to make the sale of gas illegal should be implied from the penalties provided by secs. 59 and 60.

If sec. 60 is taken in its widest sense, and not limited to cases where the testing place has been ascertained and notice thereof given, and where the pipes have not been connected, then the implied prohibition would be greater

than the expressed one, and the latter would be a meaningless enactment.

If the alleged implied prohibition is restricted in its effect to the same limits as the expressed, the latter is still unnecessary. It seems to me that the rule expressum facit cessare tacitum should be applied in order to enable us to hold that Parliament meant something when it enacted the expressed prohibition as to legality of selling, and, having done so, that it said all that it meant, leaving nothing to be implied.

I am further of opinion that, reading sec. 44 with 34, it should be held that the former does not become operative till the latter has been acted upon and a testing place appointed and notified to the undertaker. If so, then there could be no default under sec. 44 till sec. 34 is put in operation by the Department, which has not happened in this case.

Section 59 imposes penalties for failing to procure and post up the certificates of tests required by the Act. But, as secs. 34 and 44 do not, on my reading of them, require such procuring and posting up till after the testing place is prescribed, and the undertaker notified, I am of opinion that no certificates have yet been required by the Act, in the present case, and, consequently, that there has been no infringement of sec. 59 by the plaintiffs.

PHIPPEN, J.A.:—This action is brought to recover an amount alleged to be due for gas supplied to the defendant from the plaintiffs' works at Carberry. The defendant contends that the plaintiffs having failed to comply with secs. 34 and 44 of the Gas Inspection Act, R. S. C. ch. 87, the transaction is illegal.

Section 34 prohibits the sale of gas after a testing place has been prescribed by the Department, during such period as the manufacturer, after notice, shall fail to connect his premises therewith. In the present case no testing place has been prescribed, and no notice given. In my opinion, therefore, this section is not an answer to the plaintiffs' claim.

The appellate division of the Court of King's Bench decided in Manitoba Electric Gas Light Co. v. Gerrie, 4 Man. L. R. 210, that the Gas Inspection Act was passed for the protection of the public. With this I fully agree. Unless the language of sec. 44 is elsewhere modified in the

Act, default in posting the certificate, under the principle of the Gerrie case, renders the sale illegal.

It is argued that, as the object of sec. 34 is synonymous with that of 44, and as 34 specifically prohibits sale, besides rendering the manufacturer liable to a fine, while the only punishment provided by the Act for breach of 44 is a fine, Parliament has thereby indicated that a breach of 44 should be punishable by fine only. I do not think so. Section 44 was first enacted as sec. 8 of ch. 35 of 47 Vict. The section which then corresponded with 34 (sec. 28 of ch. 48 of 36 Vict.) contained no prohibition against selling. I think we cannot infer this limitation.

Section 7 provides that "in every city, town, village, or place in Canada where gas is made for sale, one or more inspectors of gas and gas meters may be appointed by the Governor in council."

Section 31: "Every undertaker in any city, town, or place for which there is an inspector of gas, shall be held to have undertaken that,—(a) the supply of gas shall be regular and sufficient; (b) it shall be supplied under sufficient pressure; (c) the quality of gas," etc.

Section 35: "The inspector may, at any reasonable time, . . . test the gas furnished by the undertaker (manufacturer) at the testing place prescribed as aforesaid, or at any other place at the option of the inspector."

Section 44: "Every undertaker shall keep the public informed of the illuminating power of the gas supplied by him, by procuring a certificate from the inspector, and posting it up in the chief office of the undertaker from time to time as follows:—

(Provision is then made for posting the certificate at intervals varying from a week to 3 months, according to the number of meters in use).

No inspector has been specially appointed for the town of Carberry. In fact only one inspector has been appointed for Manitoba, Saskatchewan, and Alberta, and it is apparent that it is utterly impossible for him to make the required inspections to enable the manufacturers to comply with the Act. The plaintiffs urge that sec. 7 requires an inspector to be separately appointed for each city, town, and village where gas is manufactured for sale; further, that no inspecting place has been established; and that until both of these conditions are complied with, the restrictive provisions of the Act are inapplicable.

Sections 34 and 44 are both subsidiary to sec. 31. Unless the undertaker comes within the last named section, he is subject to no statutory obligation to supply gas of any standard quality, nor can testing places be established with which he can be compelled to make connection.

Section 31 limits the obligation to undertakers who are in any city, town, or place for which there is an inspector of gas. Can it be said one inspector having been appointed for the provinces of Manitoba, Saskatchewan, and Alberta, the town of Carberry, in Manitoba, is a town or place for which an inspector has been appointed?

Having regard to the nature of the obligations imposed, the required physical connection of the plants with the testing places, the impossibility of the undertaker obtaining the necessary certificates, in the absence of a local inspector, and the penalty attached to failure, a daily penalty with a prohibition against the continuance of his business, I am of the opinion that the provisions of secs. 31 to 47 inclusive are not applicable to places for which there is no local inspector.

The appeal must be dismissed with costs.

HOWELL, C.J.A., and PERDUE, J.A., concurred.

EXCHEQUER COURT OF CANADA.

MARTIN, LOC. J. ADM. MARCH 7TH, 1908.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

REX v. THE "CARLOTTA G. COX."

Ship—Seizure and Condemnation—Illegal Sealing—Behring Sea Award Act, 1894 — Evidence of Offence — Onus — Failure to make Entries in Official Log—Penalty—Seizure by United States Revenue Cutter—"Duly Commissioned and Instructed"—Irregularities—Regular Proceedings in Court—Forfeiture of Ship—Release on Payment of Fine.

Action for condemnation of the above named ship.

F. Peters, K.C., for the Crown.

A. P. Luxton, K.C., for the owners of the ship.

MARTIN, LOC. J.:—On 29th May, 1907, shortly after 7 a.m., the sealing schooner "Carlotta G. Cox," John Christian master, a British vessel registered at Victoria, was boarded, searched, and detained by the United States revenue cutter "Rush," in the North Pacific Ocean, off Yakutat Bay, in latitude 59° 10′ N. and longitude 141° 19′ W., being suspected of contravening the Behring Sea Award Act, 1894, which, inter alia, forbids subjects of Great Britain and the United States of America from pursuing, killing, or capturing fur seals during the close season (beginning on 1st May and extending to 31st July), on the high sea north of the 35th degree of N. latitude and eastward of the 180th degree of longitude. Later, and on 4th June, the schooner was formally seized at Sitka, where she had been towed by the "Rush," and she was thence towed to Port Simpson, B.C., where she was handed over to Captain Hackett, master of the Canadian Government steamer "Quadra," then employed by the Department of Marine and Fisheries in the lighthouse service, who arranged with Captain Christian that he should take the schooner to Victoria and deliver her to the collector of customs there, which was done.

At the time of the first searching on 29th May, there were 77 fur seals skins in the schooner's salt-room, of which the 6 top ones were very green, with blood on them so fresh that it soiled the fingers; the 7th and following skins were quite distinct in appearance, not fresh nor moist, but cured. On 4th June, when these 6 skins were again examined, they had changed in appearance so that they could not be distinguished from the others: when the said 6 were first seen, they had a thin layer of salt on them. The schooner's log was not written up, but the master said he had a note book with pencil entries, which he produced, and said contained the particulars of seals killed, from which he claimed to be able to make the entries in the log required by art. 5 of the first schedule of said Act, and later he did, before reaching Sitka on 4th June, make certain entries therein shewing his total catch to be 133, out of which 56 skins had been landed at Hesquiat, V.I., on 22nd April, for shipment to Victoria.

The schooner was fully manned and equipped for sealing, and was admittedly within the prohibited area when seized, but the contention of her captain is that all the seals had been taken before the close season and outside of the pro-

hibited area. At the time she was first discovered, about 6 a.m., by the "Rush," she was lying-to, not sealing: the weather was clear, and Mount St. Elias could be distinctly seen, 68 miles away. That locality is well known to sealers as the Fairweather sealing grounds, and fur seals had been seen by the "Rush" in the vicinity for several days before, and at the time of search a Japanese sealer was engaged in sealing within 5 or 6 miles of the "Carlotta G. Cox," with several boats out, and other Japanese vessels had previously been sighted sealing in the vicinity and using firearms, the use of which is forbidden British and United States subjects by art. 6 of the said first schedule; as one of the officers of the "Rush" described it, "Japanese vessels were shooting all round there," and, though the "Rush" boarded one of them on the same morning, shortly after she had searched and detained the "Carlotta G. Cox," nothing could be done to stop it, because Japan is not a party to the treaty between Great Britain and the United States of America upon which the said Behring Sea Award Act, 1894, is founded.

With respect to the said 6 green skins, I am satisfied, largely upon the convincing evidence of the pilot of the "Rush," James W. Keen, who has had a long experience in salting, overseeing, and examining seal skins in the waters in question, and in connection with seizures, that the seals from which they were taken had been killed within 4 days before 29th May at the outside, and possibly some not longer than 24 hours. But, even taking the killing to have been within 4 days, what explanation is offered by the master? Nothing that is satisfactory to this Court, and, in the circumstances, the entry in his log which states that the last killing of seals took place over a month before, viz., on 27th April, when 25 were captured, is entitled to no credit. The master was not brought forward as a witness to explain this suspicious circumstance, and I have no hesitation, on all the facts, in rejecting the suggestion that he happened to be in the locality in question hunting for sea otters, or on his way to Kadiak Island, or the Shumagin Islands, for that purpose. It was laid down by this Court in The "Minnie," 3 B. C. R. 161, 4 Ex. C. R. 151, 23 S. C. R. 478, and in The "Shelby," 4 B. C. R. 342, and followed by a long line of cases ending with The "Otto," 6 Ex. C. R. 188, that the statutory onus upon the master to explain his conduct, in circumstances similar to these, is a strong one,

but, like the master in the "Shelby" case, he did not come forward (though this was done, e.g., in The "Ainoko," 3 B. C. R. 121) to discharge that onus, nor was any reason given for his failure to do so; therefore, I am satisfied, on all the facts, that his schooner was employed in the unlawful killing of seals as charged.

There is a further charge, in par. 9 of the statement of claim, that proper entries were not made in the official log giving the particulars of killing as aforesaid, and the condemnation of the vessel is also asked on that ground, but it has been already decided by this Court in The "Beatrice," 4 B. C. R. 347, that such neglect is not one which attaches any penalty or forfeiture to the ship, though the master is personally liable to suffer the statutory consequences; therefore, it is unnecessary to consider that point in relation to the schooner. With respect to the decision in the "Beatrice" case, it may be that, as Mr. Luxton contends, full consideration was not given to sec. 4 of the said Act; nevertheless, Mr. Peters is justified in claiming it as an express decision on the point in his favour, by which I am bound.

But the objection is raised that the seizure here was unlawful in that the commander of the "Rush" is not shewn to have been "duly commissioned and instructed by the president" to seize a British vessel, as is required to be done by sec. 1 of the Imperial order in council of 30th April, 1894, and also that the name of the United States vessel making the seizure was not beforehand "communicated by the President of the United States to Her Majesty as being a vessel so appointed" for that purpose, as is also required by said order in council. And it is further objected that the commander of the "Rush" neither brought the schooner "for adjudication before any such British Court of Admiralty," nor "delivered her to any such British officer as is mentioned in the said section (103 of the Merchant Shipping Act, 1854), for the purpose of being dealt with pursuant to the recited Act" (i.e., Behring Sea Award Act, 1894). Section 103 is as follows:—

"103. . . . And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein,

become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having admiralty jurisdiction in Her Majesty's dominions; and such Court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right."

In my opinion (after careful consideration of these important questions now for the first time raised in these sealing cases), even assuming that the commander of the "Rush" was not "duly commissioned and instructed" to seize the schooner, and even though the commander of the "Quadra," to whom she was first delivered, is not an officer who can take proceedings against her under sec. 103, yet, seeing the fact is that she has been brought for adjudication and is now before this Court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R.N., who admittedly is within sec. 103, and who claims her condemnation for contravention of the Behring Sea Award Act, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of this Court, and, later, before it, by Commander Allgood, who instructed the writ to be issued on 29th November, as appears by the indorsement thereof. According to the principle decided in The "Annandale," 2 P. D. 179, the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings in this Court.

The result is, therefore, that I find there has been a contravention of the Behring Sea Award Act, 1894, in the manner aforesaid, by the schooner "Carlotta G. Cox," and I therefore declare her and her equipment and everything on board of her to be forfeited to His Majesty, but, following the precedent established in The "Ainoko," 5 B. C. R. 168, and The "Beatrice," ib. 171, in case of payment of a fine of £400 and costs within 30 days, she, her equipment, and everything on board of her may be released.

Though I have come to this conclusion, yet I think it proper to observe that I have not overlooked the strong appeal of the defendants' counsel that this Court should

now cast a lenient eye upon these infractions of the Behring Sea Award Act, 1894, since, it is contended, the facts proved in the course of the hearing shew that it has failed in its object and not only places the citizens of Canada at a disadvantage in their sealing enterprises in adjacent waters, but creates special opportunities to foreign sealing vessels from, e.g., the other side of the Pacific. But, however strong a case such facts may ground in diplomatic circles for a change in the Treaty and Act, they can have no weight in a court of justice; the sole duty of a Judge is to administer the law as it is given to him by that legislature which has the power to enact it; and, therefore, I have imposed a penalty just as though there had been no change in the condition of affairs since 1894, when the statute was passed.

BRITISH COLUMBIA.

CLEMENT, J. MARCH 24TH, 1908.

CHAMBERS.

RE BEHARI LAL.

Constitutional Law—Dominion Immigration Act, 1907, sec. 30—Order in Council—Ultra Vires—Prohibition against Landing of Specified Classes of Immigrants—Delegation of Duty of Governor in Council to Minister of Interior—Detention of Aliens—Discharge.

Motion for the discharge from custody of a number of Hindoos, argued in the first instance as upon a return to writs of habeas corpus.

Brydone-Jack, and Woods, for the prisoners.

D. G. Macdonell, for the Dominion Government.

CLEMENT, J.:—The applicants are held in custody by the immigration agent at Vancouver with a view to their deportation because (as is alleged) they do not "come from the country of their birth or citizenship by a continuous journey and on through tickets purchased before leaving the country of their birth or citizenship." The right to detain them for

the cause just specified is claimed under order of His Excellency the Governor-General in council passed an 8th January last. That order in council purports to be based upon the Immigration Act, 1907, and secs. 10 and 30 are particularly relied upon as conferring upon His Excellency in council the power to pass it.

Before quoting from sec. 30, I should refer to secs. 26 to 29 (both inclusive), which all open with words of express prohibition: "No immigrant shall be permitted to land in Canada who," etc. These sections cover certain specified classes of immigrants. Then follows sec. 30 in these words: "The Governor in council may, by proclamation or order, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants, of which due notice shall be given to the transportation companies."

I may say at once that, in my opinion, the order in council of 8th January last must be upheld, if at all, under this sec. 30. Section 10 is the usual clause authorizing the framing of regulations for carrying out the Act, and cannot be invoked to support a prohibition, unless that prohibition is contained elsewhere in the Act, or in an order in council under the Act.

Turning then to sec. 30, it empowers the Governor-General to prohibit; but it does not in terms permit the delegation of this power to any other person or body. And, in my opinion, nothing short of express words would avail to enable His Excellency in council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

This brings me to the order in council of 8th January last. Omitting immaterial matter, it provides "that whenever in the opinion of the Minister of the Interior" certain conditions exist, "immigrants may be prohibited from landing or coming into Canada unless," etc. Apart from the evident fact that this order does not prohibit, but says that immigrants may be prohibited, etc.—meaning, I take it, that this may be done by immigration agents on instructions from the Minister of the Interior—it is an order expressly delegating to the Minister that duty to consider the necessity or expediency of the proposed prohibition which Parliament has in terms imposed on His Excellency in council and upon him alone. To paraphrase the language of Lord Coleridge, C.J., in Cook v. Ward, 2 C. P. D. at p. 262: "That was in effect

the Governor-General in council assuming to clothe the Minister, a member of their body, with a power which the Parliament alone could clothe him with." See also In re Leeds Banking Co., L. R. 1 Ch. 561; Osgoode v. Nelson, L. R. 5 H. L. 636; Interpretation Act, R. S. C. 1906 ch. 1, sec. 34 (7).

The applicants must be discharged from custody, and are entitled to their costs.

SASKATCHEWAN.

WETMORE, C.J. APRIL 16TH, 1908.

CHAMBERS.

RE SMITH.

Land Titles Act—Certificate of Title—Mistake in Name—Correction—Summary Application—Jurisdiction.

Application under sec. 162 of the Land Titles Act by Frank Gilbert Smith for a summary order correcting a certificate of title issued by mistake in the name of Frank Thomas Smith.

W. D. Pickett, Moose Jaw, for the applicant.

WETMORE, C.J.:—It appears that the certificate of title in this case issued by mistake to Frank Thomas Smith, instead of to Frank Gilbert Smith, and I am asked in a summary way, and without any proceedings in the Court, to correct this certificate. I am of opinion that I have no power to do so. The application was stated to have been made under sec. 162 of the Land Titles Act. That section does not give me the summary authority which is contended for; that simply preserves to the Court or a Judge the powers which they would have ordinarily in regard to a proceeding respecting land. In order to authorize a Judge acting under that section there must be a proceeding instituted in the Court respecting land or in respect to some transaction or contract relating to land, or in respect of some instrument, etc., affecting land. The word "proceeding" covers the whole section, and I repeat that the proceeding must be started in the Court in order to give the Judge jurisdiction to exercise the powers and authorities which are specified in that section. I will

refer, however, to sec. 160. There power seems to be given to cancel any instrument, etc., that has been issued in error and to correct it. But, it seems to me, if that power is contained there, that, under the circumstances of this case, the registrar is in a position to do the correcting. There will be no difficulty, I presume, in Mr. Smith bringing his certificate in to be cancelled or corrected as the case may be; and, if so, there will be no necessity to refer the matter to a Judge unless the registrar is doubtful as to what his powers may be. Anyway I can do nothing without a reference from the registrar.

This application will have to be refused.

SASKATCHEWAN.

WETMORE, C.J. APRIL 21ST, 1908.

CHAMBERS.

RE ANNABLE AND ANNABLE.

Arbitration and Award—Motion to Set aside Award—Notice of Motion instead of Summons — Irregularity — Waiver— Submission to Arbitration—Appointment of Umpire — Misconduct of Arbitrators— Refusal to Hear Evidence — Hearing Evidence in Absence of one Party—Interference of Umpire.

Application to set aside an award.

E. G. Taylor, Moose Jaw, for the applicant.

W. B. Willoughby, Moose Jaw, for the respondent.

WETMORE, C.J.:—I may state that I have some doubt, this application having been made in Chambers, whether it came properly before me on notice of motion. However, as counsel appeared for the respondent and took no objection, I think I am at liberty, under Rule 538 of the Judicature Ordinance, to treat the matter as an irregularity, and, that being so, that it has been waived by counsel so appearing and taking no objection to the procedure.

The parties in difference submitted the matters so in difference to the arbitration of Wellington White and William Boyle, and it was provided that if the arbitrators were unable to agree they might appoint an umpire, whose decision should

be final. These arbitrators appointed one Samuel McArthur as umpire. It is not very clear to my mind, under the affidavits, when McArthur was appointed, whether it was before the arbitrators entered upon their duties or very shortly afterwards; at any rate, he was appointed very near the beginning of, if not before, the hearing. It would seem also as if the arbitrators had made up their minds before they heard any testimony at all that they were going to be unable to agree. I cannot see that it was objectionable to appoint the umpire before they proceeded to the hearing or that the umpire sat with them during the hearing.

A number of grounds of objection are taken to the validity of this award. It is not necessary for me to discuss the whole of them, because I am satisfied on 2 grounds at least, and possibly on 3, that the award is bad.

In the first place, the arbitrator Boyle and the umpire McArthur, who made the award (the arbitrator White refusing to join in it), refused to hear testimony on behalf of the applicant that was properly offered, namely, the testimony of one Rufus Smith. Their excuse for so doing was that Smith was merely to be sworn to corroborate the amount set forth in an account which he had sworn to by affidavit, and that the respondent disputed the accuracy of Smith's statement, that the advisability of hearing the evidence of Smith was discussed, and Boyle and the umpire arrived at the conclusion that the arbitrators could not gain anything by calling Smith on the points on which it was stated he was about to give evidence. This was no excuse at all. These arbitrators had nothing before them except Smith's affidavit. If he had been allowed to give viva voce testimony, and the arbitrators had had the opportunity of considering the manner in which he gave his testimony, it might have materially influenced their decision.

In the next place, I find that these arbitrators and umpire, after the hearing was practically over, and when the applicant had gone away, in his absence recalled the respondent and heard further testimony. That was clearly bad: and the applicant, so far as I can discover, has done nothing to waive the irregularity. In Dobson v. Groves, 6 Q. B. 636, it was held that the award under such circumstances was bad. Lord Denman, C.J., in delivering judgment at p. 647, states: "I think that on such subject we can draw no line, but must abide by the general principle and oppose all attempts to explain by the bearing of particular parcels of evi-

dence whether the inquiry had, or by any probability might have had, an effect upon the arbitrators' decision." I also refer to McNulty v. Jobson, 2 P. R. 119; Waters v. Daly, ib. 202; and Hay v. Hay, 1 DeG. F. & J. 157.

Again, the umpire was not content to sit with the arbitrators without interfering, but I find that he took an active part throughout the whole hearing, so active that I cannot but come to the conclusion that it might possibly have had an effect in preventing the arbitrators agreeing. In Flag Lane Chapel v. Mayor, etc., of Sunderland, 9 Jur. N. S. 894, a matter in difference had been referred to two arbitrators, with a proviso that if they disagreed they should name an umpire, who might in that case make an award. The arbitrators disagreed and appointed an umpire, and it was held that it was no ground of objection to the award that all 3 had sat and heard the evidence together, and then the umpire had made the award; but, in delivering judgment, Cockburn, C.J., laid down the following to the applicant: "If you had produced an affidavit that he had wrongly interfered so as to prevent a final agreement between the parties, it might have been different." I am not clear that this last ground which I have stated is fatal to the award. I merely refer to it.

The two other grounds, I am of opinion, are fatal.

This application must be granted, therefore, and the award in question set aside with costs.

SASKATCHEWAN.

WETMORE, C.J. APRIL 23RD, 1908.

CHAMBERS.

ALLOWAY v. PAMRANKE.

Summary Judgment — Rule 103 — Action on Promissory Note—Affidavit in Support of Motion—Sufficiency—Presentment — Pleading — Defence of Fraud—Notice—Defence Available to all Defendants—Unconditional Leave to Defend.

Motion by plaintiffs under Rule 103 of the Judicature Ordinance for summary judgment, on the ground that there was no defence to the action.

J. A. Cross, Regina, for plaintiffs.

A. L. Gordon, Regina, for defendants.

WETMORE, C.J.:—The learned counsel for the defendants urged at the return of the summons that the cause of action was not verified according to the requirements of the Rule. The action was brought upon a promissory note made by the defendants (there are about 16 of them) for $1,500 payable to the order of Christner & Fisher, and indorsed to the plaintiffs. The affidavit of Champion, one of the plaintiffs, sets up that the action was brought upon the promissory note in question, and refers to it as an exhibit; that it was indorsed by the payees to the plaintiffs; that the plaintiffs became the holders thereof before it was overdue, and took the same in good faith and for value; that they are the holders in due course; and that the defendants are justly and truly indebted to the plaintiffs in the amount of the note and interest, less the sum of $475, which was paid thereon. The objection taken is that the affidavit does not aver that the note was presented for payment before action brought, and it was also urged that, as the statement of defence averred fraud, and the plaintiffs were not holders in due course of the note, the affidavit should have set up that the plaintiffs were now aware of the alleged fraud. I am of opinion that the affidavit is sufficient. In the first place, this note was not payable at a particular place, and presentment was not necessary to bind the makers either at common law or under the Bills of Exchange Act. It was contended that, because the statement of claim alleged presentment, it would be necessary to prove it. I am of opinion that that is not correct. That allegation would require no more proof than was necessary if it had not been there—it may be treated entirely as surplusage. In the next place, Mr. Champion's affidavit was made before the defence had been delivered at all. In Codville v. Smith, 3 W. L. R. 197, I held that it was sufficient to verify the cause of action, in general terms, and this affidavit is quite within what I held to be sufficient in that case.

Affidavits were read on behalf of two of the defendants, namely, Thode and Potter, setting forth that the note was tainted with fraud, and the character of the fraud was as follows: that Christner & Fisher, the payees of the note, were the owners of what they asserted to be an imported jack, named "Ringstar," which Fisher represented to be fit for the purpose of breeding mares; that Fisher and one Govier came out to Thode's farm, bringing a quantity of whisky with them, with which they plied Thode until he became

intoxicated; that they then produced an agreement to him to take shares in a jack for breeding purposes only; one full share of $100 was to entitle him to free service for 7 mares, any number of mares less than 7 were to be charged at the rate of $15 each; Thode agreed to take one full share of $100 for 7 mares, and while so intoxicated was induced to sign the document, which he did not read and which was not read over to him; that he was not furnished with a copy of it, and, although he has applied to Govier to see the agreement (Fisher having informed him that it would be left with him), he has been unable to see it, Govier stating that he could not find it. The alleged agreement which he so signed was this note. Potter swears to exactly the same state of things word for word, in so far as he was concerned. These two men do not state that they were present together when this took place; but Fisher and Govier went to each man's residence and perpetrated, as alleged, the same fraudulent act at each place. After the defence was put in, which was put in for all the defendants, a summons for leave to sign judgment was taken out. The defence sets up that the plaintiffs are not the holders of the note in due course, and then it proceeds to allege the fraud which I have mentioned. There is no allegation of notice of the fraud on the part of the plaintiffs, nor is there any affidavit verifying the knowledge on their part of the fraud, or that they took it after maturity. In Ward v. Plumbley, 6 Times L. R. 198, it was laid down by Wills, J., that if there was a fair probability of a defence the defence ought to be allowed. I find that this case has been cited through the practice books steadily for a great number of years, and I assume, therefore, it may be accepted as correct practice. That being so, my attention has been called to Moore v. Scott, 5 W. L. R. 381; that was an action brought by an indorsee of a promissory note, and the plea was that the note was tainted with fraud, and Howell, C.J.A., laid down that in a case of that sort the affirmative was on the holder of the note to "prove: (1) that he became the holder of it before it was overdue; (2) that he at that time had no notice that the note had previously been dishonoured; (3) that he took the note in good faith and for value; (4) that at the time he took the note he had no notice of the defect in the title of the payee." I express no opinion with respect to what is laid down there; but I have only to say that, in view of the fact that the defendants have pleaded that the plaintiffs were not holders in due course, and that

they have pleaded the fraud, and in view of what was laid down in Ward v. Plumbley, I ought not to deprive the defendants Thode and Potter of their right to defend this action.

Mr. A. L. Gordon appeared for all the defendants, and contended that they should all have leave to defend. I have had great doubts with respect to this, as the defence disclosed by the affidavits struck me as being personal to the two defendants who made the affidavits, but it has occurred to me that if the note is tainted with the frauds alleged in respect to Thode and Potter, it might be argued with great force that it would affect the rights of the other defendants, because it would affect their rights to contribution if the defence of these two defendants was established; therefore, the note being tainted with fraud, would be invalid as against all the defendants. I express no opinion with respect to that, but I think the other defendants ought to be allowed to set that up.

I will therefore discharge the summons. The costs of this application will be costs in the cause to each party.

MANITOBA.

MATHERS, J. — MARCH 27TH, 1908. APRIL 10TH, 1908.

CHAMBERS.

RE CANADIAN NORTHERN R. W. CO. AND ROBINSON.

Costs—Dominion Railway Act—Arbitration—Compensation—Reference to Taxing Officer—Principle of Taxation—"Costs, Fees, Counsel Fees, and Expenses of the Arbitration"—Solicitor and Client—Tariff of Costs—Items—Work done before Appointment of Arbitrators—Arbitrators' Fees—Payment by Owner—Inclusion in Bill of Costs—Quantum of Counsel Fees—Witness Fees—Expert Witnesses—Costs of Taxation.

Application by Robinson, a land owner, under the Dominion Railway Act, to tax the costs of an arbitration as to

the compensation to be paid for land taken by the railway company for their railway.

A. B. Hudson and H. Ormond, for Robinson.

O. H. Clark, K.C., for the railway company.

MATHERS, J.:—On an application to tax the costs of an arbitration under the Railway Act I adopted the practice which is well established in Ontario, and referred the bill to the senior taxing master: Re Oliver and Bay of Quinte R. W. Co., 7 O. L. R. 567, 3 O. W. R. 318. The parties afterwards applied to me for a direction to the taxing officer as to the principle on which these costs should be taxed, whether as between party and party, or as between solicitor and client.

The land owner is, under sec. 199 of the Act, entitled to the "costs of the arbitration;" and, by sec. 2, sub-sec. 5, "costs" includes "fees, counsel fees, and expenses." This latter sub-section defining costs was added as an amendment in 1903. Prior to that a party entitled to costs could only claim them as between party and party: Re Bronson and Canada Atlantic R. W. Co., 13 P. R. 440; Re Oliver and Bay of Quinte R. W. Co., supra. The question is, has the amendment made any difference? Reading sec. 199, as interpreted by sub-sec. 5 of sec. 2, the proprietor is entitled to the costs, fees, counsel fees, and expenses of the arbitration. The expression "full costs and expenses" would mean solicitor and client costs as applied to the Railway Act: Hyde v. Mayor of Manchester, 12 C. B. 474; though it would not be so with respect to ordinary litigation; but "all costs incidental to the arbitration" would not: Re Bronson and Canada Atlantic R. W. Co., supra.

By sec. 34 of the Land Clauses Consolidation Act, 1845, the successful party becomes entitled to "all costs of any such arbitration and incidental thereto," and under it taxing masters usually adopt a method of taxation less liberal than solicitor and client costs, but more liberal than between party and party: Brown & Allan on Compensation, p. 63. In Malvern Urban District v. Malvern, 83 L. T. 326, the question arose upon an agreement between a district council and a gas company, confirmed by a private Act of Parliament, for the purchase by the council of the company's undertaking, the price to be ascertained by arbitration. Clause 7 of the agreement was as follows: "7. The

council shall pay all costs, charges, and expenses of the company preliminary and incidental to the negotiations for the sale and the preparation and execution of this agreement, and the said arbitration, the same to be taxed in case the parties differ."

It was held by the Court of Appeal that the costs given by this section should be taxed on the solicitor and client scale, as by that means the intention of the parties that the company should come out of the business as nearly as possible scathless would best be given effect to.

Prior to the passing of sec. 2, sub-sec. 5, of the Railway Act, the ordinary party and party costs of the arbitration were taxed to the successful party on a liberal scale, it is true, but still as between party and party.

In this state of the law sub-sec. 5 of sec. 2 was passed. It would be difficult to assign a reason for this amendment unless it were intended to give to the successful party something to which he was not previously entitled. The agreement in the Malvern case provided for "all the costs, charges, and expenses of the company preliminary and incidental to . . . the said arbitration." While these words, in so far as they refer to preliminary expenses, may be wider than the words "costs, fees, counsel fees, and expenses of the arbitration"—the words used in the Railway Act, as interpreted by the amendment referred to—I cannot see that they are otherwise in effect different. I can see no difference between "costs" and "all costs." Both expressions, to my mind, mean the same thing.

I have come to the conclusion, therefore, that the principle of taxation of costs to be applied under the Railway Act has been changed by the addition of sub-sec. 5 of sec. 2. Such costs should now be taxed as between solicitor and client, that is to say, the party entitled is to have all the costs and expenses he may have reasonably incurred, or, as stated by Williams, L.J., in the Malvern case, "all the reasonable costs which a prudent man would incur in the matter."

All authorities agree that where land has been taken compulsorily, the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done and every expense that was necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him in taxation. But, of course, he should not be allowed for un-

necessary work or expenses, or for costs incurred through over-caution, or, as said by Smith, L.J., when "he has indulged in luxuries of costs."

The tariff of costs prescribed for ordinary litigation may be accepted as a general guide, but where, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it, and should not follow it.

With these general directions I leave the matter with the taxing officer.

MATHERS, J. (after taxation):—This is an arbitration proceeding under the Railway Act. A short time ago the parties applied to me to tax the costs of the proceeding under sec. 199 of that Act. Following the well settled practice in Ontario, I referred the bill for taxation to the senior taxing officer. He has completed his taxation, and the matter now comes before me for confirmation.

Counsel for the railway company raised several objections to the bill as taxed by the taxing master. In the first place he contends that work has been allowed for which was done before the arbitration began, and, as the Act only gives the costs of the arbitration, there is no right to tax costs anterior to the commencement of that proceeding. In substance I agree with this contention, but I cannot agree that the arbitration only commenced when all the arbitrators had been appointed. In my opinion, the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay and naming their arbitrator. This notice was served on 31st October, and all the items taxed prior to that are for work that would properly be costs of the arbitration if performed after. For example, "fee perusing the order of the Board of Railway Commissioners giving leave to expropriate," and "taking instructions," are both proper charges in the arbitration proceeding, and would have been taxed without question if they had been charged in the bill subsequent to 31st October. I think, under the circumstances, the taxing officer was justified in allowing these items.

It was also objected that because the owner paid the arbitrators' fees and took up the award he is not now entitled to recover these fees from the company. In support of that contention the case of Shrewsbury v. Wirral, [1895] 2 Ch. 812, is relied upon. That was a case under the Land

Clauses Act, 1845, and it was held that the owner, having paid the arbitrators' fees and taken up the award, was not entitled to recover such payment from the company. That conclusion was arrived at upon the construction of sec. 35 of the Land Clauses Act, which is as follows: "The arbitrators shall deliver their award in writing to the promoters, who shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose." It was held that that section made it the duty of the promoters to take up the award and pay the arbitrators' fees; that no such duty was cast upon the owner; that he had no right to the award, and if, by payment of the fees, he had got possession of it, his payment was a purely voluntary act and he had no right to recover it. The Court further held that his proper course was to have applied for a mandamus to compel the promoters to pay the fees and take up the award. The Canadian Railway Act contains no provision at all equivalent to this sec. 35. Here, either party has a right to take up the award. The arbitrators have a common law lien upon the award for the amount of their fees, and they cannot be compelled to surrender it until these fees are paid. Even under the Land Clauses Act it is held that the lien still exists: The Queen v. South Devon R. W. Co., 15 Q. B. 1043; The Queen v. London and North Western R. W. Co., [1894] 2 Q. B. 512. As under the Railway Act there is no duty cast upon the company to pay the fees and take up the award, they could not be compelled to do so. If the owner desires to proceed upon the award, he must pay the arbitrators' fees before he can get possession of it. Such a payment cannot be considered as a voluntary payment, and, therefore, I think the taxing officer was right in taxing these fees as part of the costs of the arbitration.

The other point raised by the counsel for the railway company was as to the quantum of the counsel fees allowed. The arbitrators appear to have had 14 meetings at which counsel were present. These meetings, I am led to believe, were of about 2 hours' duration each. For 10 of these the taxing officer has allowed for first counsel $150 each, and for 4 of them $100 each. Second counsel was present at 12 meetings, for 8 of which $100 each is allowed and for 4

$75 each; making a total of $3,000 allowed for counsel fees. The case was one of great importance, involving a large sum of money and a great amount of labour and careful and unremitting attention on the part of counsel. The time spent during the hearing of the evidence was, no doubt, but a small fraction of the time which counsel had to necessarily spend in preparation for the meetings of the board. The learned taxing master informs me that he allowed these large fees because of the magnitude of the questions involved and the amount of work which it appeared had devolved upon counsel in the proper preparation and presentation of the case. I have great reluctance in interfering with the decision arrived at by a taxing officer of such large experience—an officer in whose judgment the Court has the greatest confidence—particularly when that conclusion was arrived at after deliberation. Were this an ordinary appeal from his taxation, I would not hesitate to refuse. In this case, however, the responsibility is mine, and while the costs in proceedings of this kind should be allowed on a liberal scale, I think the taxing officer has erred on the liberal side. If counsel had been engaged for the entire day, either in preparing or attending before the arbitrators, it seems to me the fees allowed are in excess of what he would be entitled to. If $100 per day is allowed for first counsel and $75 per day for second counsel, the allowance would, I think, still be liberal. On this scale there should be $500 taken off the first counsel fees and $200 off the second, making a total reduction of $700.

The owner objected to the taxation of the witness fees. Evidence was produced to shew that one expert witness had been paid $150 and several others $50 each. The taxing master allowed in respect of these fees only $25 each. The cases cited on behalf of the owner do not bear out his contention that he should be allowed the amount actually paid. They shew that a fair amount may be allowed to an expert witness for the purpose of qualifying himself to give evidence; but what is a fair amount should be settled by the taxing master, in view of all the circumstances. I have discussed with the taxing officer his reason for arriving at the conclusion he did with respect of these fees, and it appears to me he has exercised a proper discretion.

The costs of taxation should be borne by the company. For the first argument before myself I allow a fee of $25; for the taxation before the taxing master, after consultation

with him, I fix the costs at $25. I think there should be no costs of the subsequent argument before myself.

The net result will be that the bill as taxed by the taxing officer at $5,242.09 will be reduced by $700, leaving $4,542.09, to which should be added $50 allowed for taxation, leaving the net bill $4,592.09.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

HAYES v. DAY.

Contract—Remuneration for Services — Selection of Land for Purchase—Principal and Agent—Evidence of Oral Contract—Secret Profits—Illegal Contract.

Appeal by defendant from judgment of SIFTON, C.J., in favour of plaintiff for the recovery of $9,666.66 in an action for remuneration by way of commission for selecting lands for defendant.

The appeal was heard by SCOTT, HARVEY, and STUART, JJ.

George Henwood, for defendant.

O. M. Biggar, for plaintiff.

SCOTT, J.:—Plaintiff in his statement of claim alleges that the defendant agreed with him that, in the event of his (plaintiff's) selecting certain lands, the defendant would pay him 33⅓ cents for each acre selected by him.

Plaintiff relies upon what took place during an interview between him and the defendant, in the presence of one Bull, at Wetaskiwin on 21st March, 1904, as constituting such an agreement. His version of what occurred at that time is as follows:—

"Mr. Day wanted to know if I could select a tract of land for him, and I asked him how I would make out, what commission I would get out of the deal. He said I would make more money than I had ever made in my life before,

that we would easily make $1 an acre on the turn-over, which would be divided equally among the 3 of us present."

I cannot construe this as establishing the agreement relied upon by the plaintiff, viz., that he was to be paid at the rate referred to for the lands selected by him. To my mind, the defendant's statement amounted to nothing more than that the plaintiff might, under certain circumstances, receive, either directly or indirectly, a return equivalent to that rate. It was, therefore, merely an illusory statement as to what the plaintiff might make out of the transaction, and one that would not entitle him to claim anything beyond the value of his services. That what occurred between the parties was not intended to constitute an agreement as to the rate of remuneration is shewn by the evidence of Bull, who was a witness for the plaintiff. He states that he did not consider that what took place constituted or was intended to be a completed agreement between the parties, that he thought there would be something further as to a bargain, and the reduction of the bargain to writing, and that it was impossible for him to say or think that they had come to a final arrangement at that time.

The tract of land to be selected by the plaintiff consisted of something over 100,000 acres. The selection was completed in 12 days. The defendant does not pretend that he possessed any exclusive knowledge of where lands fit for selection were to be found. He was not to pay any money or incur any risk or liability. It is, therefore, difficult to believe that the defendant intended to give or that the plaintiff expected to receive a sum of over $33,000 in return for merely his personal services for a few days.

According to the plaintiff's version of what took place during that interview, his remuneration was dependent upon a turn-over of the lands at an advanced price. The defendant was at that time the managing director of the Empire Land Company, and was negotiating for the purchase of the land for that company. Had the purchase then contemplated been carried out, it would be a purchase by the company or by the defendant for the company. In either case, there could not be a turn-over by the defendant at an advanced price. The company might have sold at an advance, but, if the latter was the turn-over referred to, plaintiff's action would be against the company under an agreement made by the defendant as the company's agent.

Assuming that there was a contract between the parties as to the rate of remuneration, it was one for the selection of the land by sections. The contract was afterwards changed to one for selecting by townships, and the selection was not made by sections. It is reasonable to assume that the latter would entail much more work and take a much longer time than an inspection by townships. Such being the case, there should be a material difference in the scale of remuneration, and, as there was no new agreement with respect to it, the plaintiff would be entitled to only the reasonable value of his services.

In my opinion, the appeal should be allowed with costs, and judgment entered for the defendant with costs. The plaintiff, however, should have leave to amend by claiming upon a quantum meruit, and, should he so amend within 30 days, he should be entitled to a new trial on payment of the costs of the first trial.

STUART, J.:—This appeal has given me cause for very anxious consideration, but upon a careful examination of the material before us I have now no doubt as to the proper conclusion to be arrived at. There was a direct conflict of testimony upon the one crucial point between the plaintiff and the witness Bull on the one hand, and the defendant on the other. The learned Chief Justice felt compelled, in the circumstances, to accept the account given by the plaintiff of the conversation in the Driard hotel at Wetaskiwin on 21st March, corroborated as it was by the only third person who was present. I do not think there is quite sufficient in the remaining admitted circumstances surrounding the whole transaction, which certainly cast some doubt on the testimony of the plaintiff, to justify me in saying that they ought to overbalance the direct corroboration furnished by the evidence of Bull. But, while I am not, therefore, prepared to disturb the finding of the trial Judge upon the bare facts of that conversation, it is of course quite open to us, while assuming the plaintiff's story to be true, to inquire whether that conversation, taken in connection with everything else which happened, is sufficient to justify us in deciding, as a matter of law and of legal inference from facts proven, that any liability to pay the compensation claimed by the plaintiff was ever thrown upon the defendant.

Now, in the first place, it must surely strike one as exceedingly strange that the account given by both Hayes

and Bull of the conversation in question should stop so suddenly after they had narrated the words which, I assume, were used by Day upon which the claim of the plaintiff is based. The plaintiff says that Day asked him if he could select a tract of land for him, that he, the plaintiff, asked Day how he would make out, "what commission I would make out of the deal," and that Day said he, the plaintiff, would make more money than he had ever made in his life, or had ever seen before, that they would easily make $1 an acre on the turn-over, which would be divided equally among the 3 of them. There the account of the conversation ends, except that Bull says that Hayes said he could certainly get him good land. Bull says the conversation lasted "probably a couple of hours," and yet there is not a single other remark, statement, question, or answer by any of the 3 parties reported by either Bull or the plaintiff. Bull says that the land was discussed, he thinks, before the question of remuneration was spoken of. One would have expected to hear from both the plaintiff and Bull that in reply to Day's offer the plaintiff had said something to this effect, "All right, I agree to that," or "That is quite satisfactory to me," or "I will select the land for you on those terms." But there is absolutely not a single word in reply except that Hayes said that he could certainly select good lands.

Another very strange circumstance in the case is the execution of the agreement of 26th July, 1904, whereby the second company which finally took over the lands gave the plaintiff an agency, though not an exclusive one, for the re-sale of the lands in question, with a commission of 5 per cent. This document was thrust into the evidence with scarcely a word of explanation as to how it came to be signed. The plaintiff, on his side, says absolutely nothing about any facts leading up to its execution, except at one point where he says Day appointed him agent "on the train," although it does not elsewhere appear when they were on the train together or what the substance of their conversation on that occasion was; while the defendant, of course, maintains that the appointment resulted from the first conversation according to his account of what was then said. Now, it is to me quite inconceivable that such a document should have been signed without any previous negotiation or communication at all. It is also inconceivable that the plaintiff should have forgotten such nego-

tiation or communication so entirely as to be unable, if he was unable, for it appears he was not asked, to throw any light upon it. I cannot help wondering greatly why it was that he and his counsel both remained silent with regard to these negotiations which led to his getting an agency for sale at 5 per cent. on the purchase price, when his usual commission for many years with the other companies had been 5 cents an acre. In his letter of 30th June, sent from Toronto, the defendant said to the plaintiff: "I wired you to-day as follows: 'Have purchased lands, shew Walker property, will see you soon.' I will know within a week definitely as to certain matters which I will communicate by wire to you, when you may go on selling the land as rapidly as possible." The inevitable conclusion from this letter seems to me to be that on one or other of the defendant's two visits to Wetaskiwin he had arranged with the plaintiff that the plaintiff should act as agent for the re-sale of the land. How could the plaintiff possibly have forgotten about such a circumstance? He was not closely cross-examined upon this point, but why did he not tell the whole story of his own accord? It will be remembered that the plaintiff does not claim the 33⅓ cents per acre as a commission on resales, or that his services as a selling agent were also to be covered by it, but that it was to be a remuneration simply and solely for selecting the land. The defendant swears that he told the plaintiff on the occasion in question that if he, the plaintiff, could get the land up there that suited him, he would appoint the plaintiff as agent and pay him a larger commission than the Canadian Pacific Railway Company were paying him. The plaintiff does not expressly deny that anything of this kind was spoken of, and the circumstances to which I have referred lead irresistibly to the conclusion that something of the kind must have been arranged at one of their meetings in Wetaskiwin.

It is possible then to discover a reasonable explanation of the affair upon the assumption that the words sworn to by the plaintiff and Bull were also used by the defendant? Looking upon it in the light of our knowledge of what is often said or thought of and attempted in such an affair as this, it seems to me that a perfectly possible and probable explanation can be reached. It is common knowledge that when such a deal is being arranged among men engaged in real estate transactions, the temptation fre-

quently presents itself to take advantage of an opportunity presented to an agent to make a secret profit out of his principals for whom he is buying by turning property over to them at an advance upon the price which he has paid to the vendor. In the present case it is abundantly clear that Day was in fact acting at the beginning as agent for the Empire Land Co., and that Bull at any rate knew that he was acting in that capacity when he came with him to Wetaskiwin. The plaintiff says that he is not sure whether Day said that he represented a company or that he was going to form a company. In his letter of 30th June, written before any dispute arose, Day quite apparently assumes a knowledge on the part of the defendant of the position in which he had been acting, because he says: "I may say in confidence that I have had my own troubles; the Empire Land Company let the option of the 'C. P. R.' expire. The next day I personally made the purchase." Why would Day write in those particular terms to the plaintiff unless the plaintiff had understood beforehand that Day was acting for the Empire Land Co.?

All these circumstances point to the conclusion that the plaintiff did possibly know at the beginning that Day was acting as agent for a company, and that this company had been mentioned in the conversation of 21st March with which we have been furnished with such an utterly meagre account; whether that were the fact or not, it seems to me to be quite consistent with the defendant's statement that Hayes was promised an agency, that there should also have been, during that conversation, a suggestion made that a secret profit could be secured by Day by adding $1 to the price on the "turn-over," as Bull called it, to the company. The plaintiff's counsel on the argument presented this to us very strongly as a possible explanation of what had occurred, and I do not know that the plaintiff could complain if that explanation were accepted. There is, moreover, an additional circumstance to be noted which strenghens this view. The plaintiff says that in the fall of 1904, at which time it was impossible that any large proportion of the land could have been disposed of by the company, he threw up his agency because Day refused to carry out his bargain as to the "selection fee." It was then not yet possible to say that even $1 an acre on the whole tract had been made on the separate resales by the Alberta Central Land Corporation, and this fact, to my mind,

strengthens very materially the view that what the plaintiff was expecting to share in was, not the profits made by the company on re-sales, but the secret profit which was to have been made by Day in turning the land over to the company's hands, and which he then believed Day had in fact made, but had refused to divide. It seems to me, therefore, impossible to uphold the judgment of the learned Chief Justice that the plaintiff should recover out of average profits on separate resales by the Alberta Land Co., because the statement of the plaintiff that he was demanding his selection fee in the fall of 1904 is absolutely inconsistent, to my view, with any such result.

Now, in what position does this leave the parties? Assuming that Day, Bull, and the plaintiff had agreed that Day should commit a breach of trust, and that the proceeds derived from that breach should be divided between them, it is clear that Day repented and did not carry out his part of the bargain, because he swears, and it is not attempted to deny it, that he turned the lands over to the second company at the price paid for them. It was, of course, impossible for him to do anything else, because, in such a large deal with the Canadian Pacific Railway Company, no such scheme could have failed of discovery. I do not know that it is at all improbable, or that, considering the frailty of human nature, it is a matter of very serious reprehension, that in the enthusiasm of the moment the opportunity of illegal gain may have flashed for a moment upon the minds of those 3 men, and that words may have been spoken which indicated an incipient intention to attempt to take advantage of it. But, assuming that there was such an intention, or even a direct promise by the defendant, is the plaintiff in a position to say that Day should have carried out that intention or that promise, that he should have made the secret profit arranged for, and that, although Day ultimately recognized either the dishonesty or the futility of the attempt, and abandoned it altogether, he must now be held to his bargain and be forced to pay one-third of the secret profit which, after all, he did not make or attempt to make at all? It is well settled law that contracts made for the purpose of defrauding or injuring third parties are illegal and void; Leake on Contracts, 4th ed., p. 547, and cases there cited; and, if it were absolutely clear that the plaintiff was fully aware of Day's position as an agent, there can be no doubt that he

could not recover. But, owing to the obscurity of the whole evidence and to the numerous inexplicable omissions, to some of which I have already referred, and which I can only account for on the theory that both counsel were rather afraid to probe too deeply into the facts, I have been unable completely to satisfy my mind that the plaintiff was fully aware of the defendant's exact position. It is possible that he may not have fully understood it, and that, therefore, he was not really a party to and conscious of the intended fraud, assuming that a fraudulent intent did arise in Day's mind. It is possible that he may have agreed to make the selection of the lands in good faith, and may have understood that Day was acting for himself only and with a view of a resale in bulk to some one else, whom he, Day, did not as yet, at any rate, represent. If that was the situation, I think the plaintiff might be entitled to some remuneration for the work actually done, although it could not be either upon the basis of a sharing of a secret profit nor upon any express contract by Day to pay him 33⅓ cents per acre for the selection of the lands; because, in my view, the words alleged to have been used are quite insufficient to establish any such definite and direct contract as that; indeed, this was not seriously contended.

For these reasons I concur in the result arrived at by my brother Scott.

HARVEY, J. (dissenting):—The plaintiff lived near Wetaskiwin, where for many years he had acted as selling agent of the Canadian Pacific Railway Co.'s lands, of which in that vicinity he had an intimate knowledge. The defendant, desiring to buy land, was directed by the company's land commissioner in Winnipeg to the company's lands in this vicinity, and to the plaintiff as a good person to guide him over the land. The defendant came from Winnipeg to Wetaskiwin with another agent named Bull. The plaintiff was then on his ranch some 70 miles from Wetaskiwin. The defendant or Bull sent for him, and he came in. The evidence as to what took place at the interview is conflicting, the plaintiff's story, in which he is supported by Bull, being that defendant asked him if he could select him good lands, which he said he could. Plaintiff then asked what he was to make out of it, and defendant said he would make him more money than he had ever seen before, that they could easily make $1 an acre on the turn-over,

which would be divided between the 3 of them. The defendant explicitly denies this account of the transaction, and says that he only engaged the plaintiff to act as land guide, for which he paid him. The Chief Justice accepted the plaintiff's version as the true one.

In view of the authorities, of which I will only refer to Knight v. Hansen, 3 W. L. R. 412, as one of the latest and in our own Courts, the appellate Court will not disturb the finding of the trial Judge on this point.

The question then is as to the effect of this arrangement. There can be little doubt that the statement that defendant would make plaintiff more money than he had ever seen before is too indefinite to render the defendant liable on it. Then, can the statement that they could easily make $1 an acre on the turn-over, which they would divide equally between the 3, be construed into anything definite enough to constitute a binding promise. It is, of course, only conditional at the most, but it appears to me that the reasonable meaning to be derived from it is that if the land could be sold at an advance of $1 an acre over the purchase price, that $1 would be divided equally among the plaintiff, defendant, and Bull. At the time this arrangement was made, defendant was managing director of the Empire Land Co., and he apparently expected that company to become the purchaser of any lands that were selected. Several days were consumed in getting plaintiff and making the above arrangement, but nothing further was done at that time; defendant returned to Toronto, and some time later he came west again with another person, when plaintiff took them out to see the land, which defendant was satisfied with. He thereupon accepted the owner's offer for a large tract of land. The Empire Land Company, however, did not carry out the purchase, and the defendant found 3 other persons to go in with him in equal shares in the purchase, and together they purchased 116,000 acres. They then formed themselves into a joint stock company and sold the land at an advance of several dollars an acre.

The defendant says that on the transfer to this company he made no profit, and therefore the condition of the land being turned over at an advance of $1 an acre did not exist, and plaintiff cannot recover. The trial Judge, however, held that his quarter interest in the land was sold at an advance of more than $1 an acre, the condition did exist as to it, and he gave plaintiff judgment for an amount

equal to one-third of a dollar an acre on one quarter of 116,000 acres.

It is suggested that the defendant did not own the land or even an interest in the land; that all he had was shares in the company, and that, therefore, an improper view was taken by the trial Judge. If that were so, it would have been the same if the defendant had purchased all of the land and had taken in a couple of persons for formality's sake and formed a company to dispose of the land. That would put it entirely in the defendant's hands to defeat the plaintiff's claim by means of a subterfuge. The transfer to the company was not in any sense a disposal of the lands, and I can see no good reason why there should be any distinction made between the disposition of the land by the 4 owners as individuals and its disposition by them in the character of a company. The defendant's counsel objected to evidence of the profit made on the sale, and therefore it scarcely lies in his mouth to object that the profit did not amount to $1 an acre, but in any event the defendant states that it was sold at an average advance of several dollars an acre, so there seems no room for doubt that there was a profit of more than a dollar an acre over and above all expenses of the company.

In my opinion, the judgment is right, and the appeal should be dismissed with costs.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

OLSTADT v. LINEHAM.

Promissory Notes—Consideration — Fraudulent Representations—Transfer of Notes—Defective Title—Notice or Knowledge of Transferee—Evidence—Notes of Similar Character Taken by Defendant—Admissibility— Jury — Misdirection—Intent—Holder in Due Course—Bills of Exchange Act—Onus—Credibility of Witnesses.

Appeal by defendant from judgment of BECK, J., in favour of plaintiffs in an action to compel the delivery up of certain promissory notes.

J. R. Lavell and J. L. Loggie, for defendant.

G. B. O'Connor, for plaintiffs.

The judgment of the Court (SIFTON, C.J., SCOTT, HARVEY, and STUART, JJ.), was delivered by

HARVEY, J.:—This action is brought by 93 plaintiffs against the defendant, the holder of notes given by each of them to one R. L. Corey, and transferred by him to the defendant, for the delivery up of the said notes. No objection was taken to the joining of the several causes of action, and the action came on for trial and was tried before my brother Beck, with a jury, when a verdict was rendered and judgment directed to be entered in favour of the plaintiffs, from which the defendant now appeals.

It appears that Corey obtained the notes, each being for $50, payable in 5 annual instalments with interest, as a bonus for the erection of a grain elevator, an agreement shewing the terms being entered into with Corey and signed by all the makers of the notes as well. The defendant took over the agreement and the notes, there being some others in addition to those in question herein, the total being 125, paying Corey therefor $1,000, and he subsequently built the elevator and other buildings at a cost of $6,400, which he afterwards sold for $5,500. The plaintiffs alleged that the notes were obtained by fraudulent representations, and that the defendant had knowledge of the defect in title when the notes were indorsed to him.

It appears from the notes taken at the trial and admissions made on the argument that all or nearly all of the plaintiffs were present in Court ready to give evidence with respect to the making of the notes, but that, in order to shorten the trial or save expense, an arrangement was made between counsel whereby most of them were allowed to go, and only 15 were called, whose evidence was to be accepted as applicable to all of the plaintiffs' cases. This arrangement was carried out, and the evidence of only these 15 witnesses taken. On the argument before us defendant's counsel argued that in respect of some of the notes the evidence shewed that there was no fraud, and that in respect of these the defendant was entitled to judgment. In view of the arrangement made between counsel at the trial above mentioned, this objection can not now be taken, for it is admitted that there is ample evidence of fraud in respect of some of the notes, and by that arrangement that evidence is made applicable to all of the cases, and, what-

ever defence of that character might have been available, on the evidence, to the individual causes of action, it appears to me that this arrangement in effect merges all the causes of action, and the fraud shewn in certain cases affects all.

At the trial evidence was given to shew that the defendant had taken notes of a similar character from Corey at an earlier time, and it was contended that this evidence was only admissible to shew defendant's state of mind, and that it was the duty of the Judge to direct the jury that it should be looked at only for that purpose, and that he having failed to do so, there should be a new trial, and reference is made to The King v. Lovitt, 13 Can. Crim. Cas. 15, in support of this argument. The charge in that case was against the president of a bank of wilfully making a false bank return, and evidence was given to shew that he had made other similar returns. There was a difference of opinion among the Judges as to the admissibility of this evidence, and also as to whether there was any evidence to support the conviction, but the majority of them expressed the view that the trial Judge should have directed the jury's attention to the fact that this evidence should only be considered for the purpose of shewing the intent with which the return in question was made, or guilty knowledge, and by reason of the absence of such direction the conviction was set aside.

In the present case the defendant himself, on cross-examination, gave evidence as to these other notes, and stated that he had heard at the time he purchased the notes in question in this action, through newspaper report or rumour, that some of the makers of the first lot of notes had stated that they were obtained by false representations. Now, the question involved was whether the defendant had notice of defect in Corey's title to the notes within the meaning of sec. 56 of the Bills of Exchange Act. In Jones v. Gordon, 2 App. Cas. 616, Lord Blackburn, after pointing out that mere neglect is not sufficient to prevent the holder from being deemed a holder in due course, at p. 629, states: "But, if the facts and circumstances are such that the jury . . . came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions . . . because he thought in his own secret mind 'I suspect there is something wrong, and if I ask questions and make further inquiry it will no longer

be my suspecting it, but my knowing it, and then I shall not be able to recover,' I think that is dishonesty." The trial Judge, in his charge to the jury, calling attention to this evidence, said: "Now, in considering the question of whether Lineham had notice, or had such suspicion in his mind that something was or might be wrong about these notes, and deliberately refrained from inquiring about them, you will, of course, consider the circumstances that he had, on two previous occasions, bought similar batches of notes; that he had heard rumours that some of the makers of some of those notes had objected to pay them." In my opinion, this direction was proper, and called attention to the evidence with its proper bearing, and the principle of The King v. Lovitt has no application to this case.

Section 58 of the Bills of Exchange Act casts on the holder of a note the burden of proving that he is a holder in due course, when it is once established that the making of the note is affected with fraud. The result of the finding of the jury is that the making of these notes was affected with fraud. The only question then to be considered is whether the jury should have found that the defendant had satisfied the burden cast upon him.

I have some doubt in my mind as to whether it can be said in any case that a jury should find certain facts to be proved on oral testimony when there is room for them to doubt the veracity of witnesses giving the testimony, but at all events it appears to me that if it should be so held, it can only be in cases where the evidence is clear and unequivocal and points only to the one conclusion. While the evidence here may not be by any means conclusive to establish bad faith on the part of the defendant, yet, inasmuch as there is no obligation on the part of the plaintiffs to establish that, there appears to me clearly to be some evidence, such as the facts stated about the other notes of the same character passing through the same hands, the consideration paid for the notes, &c., that might raise a doubt in the jury's minds as to the good faith of the defendant, and therefore justify the finding that he had not satisfied the burden cast on him of establishing good faith. I think the appeal should be dismissed, with costs.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

DETRO v. HAGGARD.

Equitable Assignment—Fund in Bank—Claim of Execution Creditor—Receiving Order — Priorities— Time—Interpleader—Payment of Execution Creditor's Claim in Full —Refund of—Sufficient to Pay Prior Claim of Assignee of Fund—Costs.

Appeal by J. C. Pepler, claimant, from an order of HARVEY, J., dated 26th March, 1907, dismissing an application by the appellant to vary an order made by the same Judge on 2nd March, 1907.

C. A. Grant, for appellant.

E. B. Edwards, K.C., for plaintiff.

The judgment of the Court (SIFTON, C.J., SCOTT, J., STUART, J.), was delivered by

SCOTT, J.:—On 6th November, 1906, the claimant was the registered owner of certain lands, the defendant J. C. Haggard being the beneficial owner thereof, subject to the payment of a debt due by him to the claimant, for which the latter held the lands as security. On that date the claimant, with the consent of said Haggard, entered into an agreement with one Tyler for the sale of the lands to him for $2,403, payable $100 on the signing of the agreement, $791.40 in 15 days from the date thereof, and the balance to be paid to said Haggard in 90 days from the date thereof, the payments of $100 and $791.40 representing the amount of said Haggard's indebtedness to the claimant. That indebtedness was fully satisfied by payments made by the purchaser to the claimant prior to 28th November, 1906, but on that date the latter, at the request of Haggard, joined with him in making a promissory note to the Imperial Bank for $500, which was then discounted by Haggard, who received the proceeds thereof. At the time of the making of the note it was distinctly understood and agreed between

them that the note was to be paid out of the moneys then remaining due by Tyler under the agreement for sale. The note was afterwards paid by the claimant, and said Haggard is still indebted to him in respect thereof.

On 29th November, 1906, the plaintiff recovered a judgment against the defendants for $1,180.87, and on the following day placed an execution in the hands of the sheriff.

On 19th December, 1906, the planitiff issued a garnishee summons against Tyler, and caused the same to be served upon him.

On the last mentioned date the plaintiff also caused to be filed in the proper land titles office a caveat against the lands the subject of the agreement between the claimant and Tyler, in which she (the plaintiff) claimed an estate in the lands under her execution, and forbade the registration of any person as transferee or owner except subject to her claim.

On 5th February, 1907, plaintiff obtained an order appointing the sheriff of the judicial district of Edmonton receiver of any moneys due to the defendants or either of them in respect of their interest in the purchase money due by Tyler to the extent of the plaintiff's judgment and costs, and an injunction restraining the Imperial Bank of Canada, Tyler, and the claimant from dealing with those moneys otherwise than under the terms of the order. This order contained a summons calling upon all parties interested in said moneys to shew cause why the appointment of the receiver should not be continued, and why the moneys, to the extent of the plaintiff's payment and costs, should not be paid over to the plaintiff, and why such further and other order should not be made as the plaintiff might be entitled to. This order and summons was duly served upon the defendants, the claimant, the Imperial Bank of Canada, and Tyler. Upon the return of the summons on 2nd March, 1907, Harvey, J., ordered that out of the balance of purchase money then payable by Tyler, amounting to $1,561, there should be paid by him and the Imperial Bank of Canada, or one of them, for the plaintiff, the sum of $1,317.35, being the amount of her judgment and the costs of the application. The claimant did not appear at the hearing of the application, but it was shewn that his failure to appear was due to inadvertence.

On 11th March, 1907, the claimant obtained from Harvey, J., a summons requiring all parties concerned to attend on the hearing of an application to vary his order of 2nd March, 1907, by directing that out of the moneys due by Tyler the sum of $500 with interest and bank charges be paid to the claimant, before any portion thereof be paid to the plaintiff. The summons directed that all proceedings should in the meantime be stayed, and that Tyler and the Imperial Bank be restrained until further order from making payment to the plaintiff. The application came on for hearing on 26th March, 1907, before Harvey, J., who dismissed it with costs. His reasons for so doing were not put in writing, and this Court is not informed of them.

It is shewn that the moneys due by Tyler, the purchaser, were paid by him into the Imperial Bank of Canada, to be paid out by them upon his receiving a clear transfer of the lands comprised in the agreement for sale. It was admitted by counsel upon the argument of the appeal that a sufficient portion of these moneys to satisfy plaintiff's judgment and costs has been paid over to her, but whether such payment was made before or after the application to vary the order does not appear.

The notice of appeal is directed to the solicitors for the plaintiff, the Imperial Bank, and Tyler, respectively, and is not directed to nor was it served upon the defendants or either of them. It was contended that, as the claimant's only claim to an interest in the fund in question is under an equitable assignment from Haggard, the latter is a necessary party to the appeal, and that, as he is not now before the Court, the appeal must fail.

In Bowden's Patents Syndicate v. Herbert Smith & Co., [1904] 2 Ch. 86, it was held that, in an action by a person claiming under an equitable assignment, the assignor is a necessary party. This proceeding, however, is not an action by the assignee to enforce his right under the assignment. It is to all intents and purposes an interpleader proceeding between two creditors of the assignor to determine which of them as against the other is entitled to the subject matter of the assignment. It was, in my view, unnecessary that the assignor should be brought before the Court or any order made against him, as at no time since the proceeding was commenced was the fund under or subject to his control. In an ordinary interpleader proceeding between an execution creditor and a person claiming goods seized

under execution, the execution debtor is not a necessary party, and I fail to see that, so far as his interests are concerned, there is any material difference between such a proceeding and this. That the assignor in this case had no interest in the fund is shewn by the fact that counsel for the respondent in his factum asserts (and it is not disputed) that the balance of the fund remaining after satisfaction of the plaintiff's payment and costs was paid over to the claimant.

A further contention of the respondent is that the claimant should have appealed against the order of 2nd March, 1907, instead of the order of 26th March, 1907.

The answer to that objection is, that at the time the first order was made there was nothing before the Court to shew that the claimant had any interest in the fund, and therefore he had no grounds for appealing therefrom. It was only after that order was made that he disclosed the circumstances upon which his claim is founded.

What took place between Haggard and the claimant at the time the note was signed by them constituted, in my view, a good and sufficient equitable assignment by the former to the latter of so much of the purchase money then due by Tyler as would be sufficient to pay the note. That such assignments may be enforced notwithstanding that they may not be within sub-sec. 6 of sec. 25 of the Judicature Act of 1873 is well settled. See Brant's Co. v. Dunlop Tire Co., [1905] A. C. 454, and the other cases referred to in Annual Practice for 1908, vol. 2, p. 486.

The claimant by virtue of the assignment became entitled to the fund to the extent of the amount of the note in priority to the plaintiff's claim under the judgment subsequently obtained by her, and, in my view, the different proceedings taken by her under that judgment did not affect that priority.

I am, therefore, of opinion that my brother Harvey should not have dismissed the application to vary his order of 2nd March, 1907, but should have varied that order by directing that of the purchase money due by Tyler a sum sufficient to pay the note for $500 should be applied in satisfaction thereof, and the remainder paid to the plaintiff upon her judgment, but that order cannot now be made by reason of the fact that the plaintiff has received from the fund the full amount of his judgment, and the balance of the fund is insufficient to satisfy the note and the claimant's

claim thereunder. I see no reason, however, why this Court should not, under sub-sec. 5 of sec. 8 of the Judicature Ordinance, order the plaintiff to refund a sufficient portion of the moneys to satisfy the claim upon the note.

For the reasons I have stated, I am of opinion that the appeal should be allowed with costs, and that the claimant is entitled to an order directing the plaintiff to pay to him the amount now due to him in respect of the amount paid by him upon the promissory note for $500 made by him and the defendant J. C. Haggard, dated 28th November, 1906, and the costs of the action brought by the claimant against said defendant in respect of said note, less the costs incurred by the plaintiff by reason of the claimant's application to vary the order of 2nd March, 1907, and directing a reference to the clerk to ascertain the amount so due to the claimant, and to tax the costs to which the claimant and the plaintiff are respectively entitled.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

GREAT WEST IMPLEMENT CO v. GRAMS.

Promissory Notes—Price of Machine — Failure of Consideration—Evidence—Corroboration — Infant — Sale of Machine to—Retention of Machine after Majority—Ratification of Contract—Onus.

Appeal by defendant from judgment of SCOTT, J., 7 W. L. R. 190.

O. M. Biggar, for defendant.

C. F. Newell, for plaintiffs.

The judgment of the Court (SIFTON, C.J., HARVEY, J., STUART, J.), was delivered by

SIFTON, C.J.:—This is an action on three promissory notes made by defendant dated 14th April, 1904, principal

being $325, interest bringing up amount claimed to $423.15. These notes were given for a second-hand shingle machine purchased from plaintiffs.

The defences relied on were infancy and failure of consideration.

In my view of the case, it is unnecessary to discuss the second ground. The learned trial Judge found on the evidence, quite properly, that the defendant was an infant at the time of the contract, and that he must succeed on the pleadings, but allowed an amendment to the plaintiffs, claiming in effect ratification and the value of goods in the hands of defendant when he came of age, and under the authority of an Ontario decision, Louden Manufacturing Co. v. Milmine, 15 O. L. R. 53, 10 O. W. R. 474, then not fully reported, gave judgment for plaintiff for $362.80. A full consideration of that case shews, however, that the facts of this case are entirely different.

In Louden Manufacturing Co. v. Milmine, the defendant, though an infant, was apparently carrying on a continuing business. On coming of age, out of a total bill of a considerably greater amount, he still had on hand, on his own evidence, $75 worth of goods purchased from the plaintiff, which he sold and received payment for, and the Court quite properly refused to allow him, after becoming of full age, to defraud the plaintiffs, and gave judgment for that amount without costs.

In the present case, the defendant being unable to make any use of the machine, and getting no satisfaction from plaintiffs as to what he considered a very necessary change to complete the bargain, after repeated efforts, repudiated the contract entirely within a couple of months after making it, and about a year before he came of age; left the machine where it had been set up, not on his own land, or apparently on land under his control; and, so far as the evidence goes, never saw or had anything to do with it afterwards, and had no further communication with plaintiffs after his repudiation, which was in the following words: "Look here, you fellows have been fooling me long enough now, and the wood has all gone away; I have no use for the mill now; I don't want the mill. You fellows can just go and get it; I have no use for it."

There is nothing in the evidence to shew that the plaintiffs did not take his advice and regain their property. But, aside from that, there is no doubt that on this plea and

the findings of the learned trial Judge the onus was upon the plaintiffs to furnish some evidence. Ratification has been assumed sometimes on what appears to be very slight evidence, for the apparent purpose of preventing fraud, which would not be a reason in the present case, where the defendant acted with reasonable fairness. But I have failed to find any case where ratification has been assumed in the absence of any evidence, and in the face of an express repudiation and abandonment, as in the present case, and I therefore think that the appeal should be allowed, the judgment set aside, and judgment entered for the defendant with costs of trial and appeal.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

PETERS v. PERRAS.

Promissory Note—Failure of Consideration—Purchase Price of Horse—Division into Shares—Necessary Number of Subscribers not Obtained—Non-fulfilment of Agreement—Transferee of Note—Holder in Due Course—Fraud—Interest Overdue at Time of Transfer—Notice of Defects in Transferor's Title—Suspicious Circumstances.

Appeal by plaintiff from judgment of SCOTT, J., 7 W. L. R. 193.

O. M. Biggar, for plaintiff.

W. Gariepy, for defendants.

The judgment of the Court (SIFTON, C.J., HARVEY, J., STUART, J.), was delivered by

STUART, J.:—In this action the plaintiff sues as the holder in due course of a promissory note for the sum of $1,166 and interest made by the several defendants to Messrs. McLaughlin Bros. and indorsed by them to the plaintiff. The defence set up is that the note was obtained by fraud on the part of McLaughlin Bros., and that

the plaintiff is not the holder in due course. Mr. Justice Scott, who tried the action, found that there was fraud on the part of McLaughlin Bros. in obtaining the note, and that the plaintiff was not a bona fide holder for value without notice, and dismissed the action. The plaintiff has appealed from this judgment, and, admitting that the existence of fraud in the inception of the note cannot now be questioned, relies solely on the fact, which he contends was sufficiently proven, that the plaintiff took the note in good faith and for value, before its maturity.

The note was dated at Edmonton, Alberta, 27th April, 1903, and was payable in 24 months after date with interest at 8 per cent. per annum, payable annually, at the Union Bank of Canada at Edmonton. The circumstances connected with the making of the note which the learned trial Judge held to constitute fraud on the part of the agent of McLaughlin Bros. are fully set out in his judgment, and I need not here repeat them. The note was discounted at Lancaster, a town in the State of Ohio, on 3rd April, 1905, that is, after over 23 months had elapsed since the making of the note, and not quite one month before its maturity. The defendants all reside near Morinville, a country village near Edmonton, in this province. The plaintiff is a farmer residing near the town of Lancaster, Ohio. McLaughlin Bros., the payees and indorsers of the note, carry on business, among other places, at the city of Columbus, some 30 miles from Lancaster. The discounting of the note was arranged through one H. B. Peters, a brother of the plaintiff, who was, at the date of the transaction in question, a banker at Lancaster, carrying on business, apparently as a partner with others, under the name of the Fairfield National Bank. Messrs. McLaughlin had for some years had an account at this bank, or at the Fairfield County Bank, its predecessor, of which H. B. Peters had also been the manager, and they had been accustomed to discount promissory notes and other negotiable paper there. The evidence of H. B. Peters was taken under commission at Columbus, Ohio. He states that the note was sent to him by one of the firm of McLaughlin Bros., but by what means he does not say. It was, he says, accompanied by a request that credit be given to the firm on the books of the bank for the proceeds of the note. Ordinarily one would interpret this as a request to the bank itself to discount the note, particularly as the evidence shews that the bank had been

in the custom of discounting the paper handed in by the firm. The witness says that he complied with the request and did so give McLaughlin Bros. credit on the books of the bank for the proceeds of the note. It probably is of little, if any, consequence in the circumstances, but it would appear to me to be fairly clear that for a short time at any rate the bank were the holders of the note, which had been indorsed in blank, and that it was from the bank rather than from McLaughlin Bros. that the plaintiff really bought the note. H. B. Peters says that he immediately charged the amount of the proceeds credited to McLaughlin Bros. to the account of his brother, the plaintiff, thus purchasing the note for the plaintiff, but that afterwards on the same day, when the plaintiff came into the bank, he got from him a cheque for the amount. It would, therefore, of course appear upon the books that it was this cheque rather than the note which was really charged to the plaintiff's account. This was, I think, technically the effect of what occurred, but it is also quite apparent that practically H. B. Peters, either personally or in his capacity as manager of the bank, acted as the intermediary between McLaughlin Bros. and the plaintiff, and that the transaction was really looked upon both by H. B. Peters and the plaintiff as a purchase of the note by the plaintiff directly from McLaughlin Bros.

Counsel for the respondents placed great reliance upon Union Investment Co. v. Wells, recently decided in the Supreme Court of Canada and not yet reported. In my view of the judgment in that case, with a copy of which we were furnished, it decides nothing more than that the fact that interest is overdue and unpaid upon a note is not of itself sufficient to give to the note, either with respect to the interest itself or the principal, the character of an overdue note, so long as the principal has not yet matured. We are, of course, bound by that decision, and must treat the note in question here as not having been overdue at the date of its negotiation.

Section 58 of the Bills of Exchange Act says: "Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of a bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that,

subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course." In this section Parliament has practically adopted the law as laid down in the leading case of Jones v. Gordon, 2 App. Cas. 616. The result is that the burden is here laid upon the plaintiff of proving to the satisfaction of the Judge who tried the case, sitting as a jury, that he not only gave value for the note, which is admitted, but that in purchasing the note he acted honestly and in good faith. In other words, the Judge must have been satisfied by the evidence adduced by the plaintiff that the plaintiff or his agent in doing what he did was acting with entire honesty. The learned trial Judge has declared that the plaintiff failed so to satisfy him, and he has given certain reasons why he did not feel satisfied upon the point. The question now before us is whether he ought not to have been fully satisfied by the evidence before him and to have given judgment for the plaintiff.

All the evidence upon the point in question was taken by commission, as I have said, and was merely read to the Court at the trial. The Judge, therefore, had no greater opportunity than we have now to estimate the character and credibility of the witnesses, and we are, I take it, quite free to come to any opinion upon the matter, whether the same as his or a different one, which a careful perusal of the evidence seems to us to justify.

Now, what evidence did the plaintiff adduce to shew his honesty and good faith? His brother, H. B. Peters, the manager of the bank, who, he says, was acting as his agent in purchasing the note, was first examined, and in answer to very long and involved questions which set forth the facts upon which the defendants relied to prove fraud on the part of the payees, and which concluded with the bare inquiry as to what knowledge or information he, the witness, had in regard to these facts at the date of the purchase of the note, he simply replied that he had no knowledge or information whatever. It was perhaps impossible to put the questions in any other form, but, however that may be, the questions were certainly leading, and it was quite clear that the witness, unless he was fully prepared to tell the truth even at the sacrifice of his brother's action, would give but one answer to them. The same thing occurred in the examination of the plaintiff himself. No doubt, in the complete absence of all other circumstances

bearing upon the case, we should be bound to accept those denials as conclusive in favour of the plaintiff. But there are other circumstances surrounding the transaction to which attention may very properly be directed. In the first place, here is a note which was to mature two years after its date, and which the plaintiff was asked to purchase less than a month before its maturity. In the next place, it is signed by 14 makers, whose names must have appeared very foreign and strange to the plaintiff and his brother. Further, the plaintiff is not in the position of a great banking house at some commercial world centre which would be in the habit of discounting mercantile paper coming from all parts of the globe, but is a farmer living in a country neighbourhood in the State of Ohio, many thousand miles from the place where the note was dated and is payable, and which was to him in a foreign country. It is not shewn that the plaintiff ever discounted such a note before, or that he was in the habit of dealing with any such far-travelling instruments. In the face of all these facts, he accepts it and buys it, so his brother and he both say, without a single inquiry and without question. Now, it seems to me to be beyond all question that in so doing the plaintiff was guilty of gross negligence, not to say foolishness, in buying the note, though these, of course, are not always inconsistent with honesty and good faith. In Jones v. Gordon, already cited, Lord Blackburn said at p. 628: "Farther, my Lords, I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to shew that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. *All these are matters which tend to shew that there was dishonesty in not doing it* (the italics are my own), but they do not in themselves make a defence to an action upon a bill of exchange." And again at p. 629 he says: "But, if the facts and circumstances are such that the jury, or whoever has to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and, if I ask questions and make further

inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty." Now, it is clear from this judgment that carelessness or negligence do properly constitute some evidence of bad faith, and it is necessary not to forget that it is not upon the defendant to prove dishonesty absolutely to the satisfaction of the Court, although some expressions in the judgment quoted would apparently point to that, but under the statute it is upon the plaintiff to prove affirmatively his honesty and good faith. If, therefore, evidence is adduced which is proper evidence to consider, and which does throw doubt upon the plaintiff's honesty and good faith, and which does lead the Court to think that he must have suspected that there was something wrong, and that he purposely refrained from inquiry, then I think the burden is thrown upon the plaintiff of removing that doubt and of proving that he had no such suspicion. The circumstances to which I have referred do clearly, in my opinion, shew carelessness and foolishness, and do in themselves furnish some evidence of a dishonest mind on the part of H. B. Peters, who was the plaintiff's agent in the matter, and some evidence that he must have suspected that all was not right.

But there are still other circumstances to which I have not referred. The plaintiff himself, on direct examination, says that his brother, H. B. Peters, was acting for McLaughlin Bros. It is true that later on, when he, no doubt, had time to appreciate the possible effect of this, he attempts to modify that statement, but I feel justified for my part in treating his first statement as something which fell from him in an unguarded moment, and which did after all really represent the true situation. H. B. Peters was McLaughlin Bros.' banker at Lancaster. Notwithstanding the particular form which the transaction took upon the books of the bank, he was, I think, practically the agent of McLaughlin Bros. in making the sale of the note to his brother, as well as his brother's agent in purchasing from them. It is true that it is impossible to impute the full knowledge of McLaughlin Bros. to H. B. Peters as their agent, and through him again to the plaintiff, but the facts remain that H. B. Peters was intimately associated with McLaughlin Bros. as their banker, that he had frequently and as a habit discounted their commercial paper, that he had had promissory notes of theirs in his hands

which referred to transactions similar to that in question here, and that there had to his knowledge been trouble in collecting them from the makers. It does not, in my opinion, make any difference whether he knew the exact cause of the trouble in those cases or not, or how far the trouble had gone. He knew that it had in fact arisen, and yet, knowing this, he unquestioningly and blindly buys the note in question here, with all the peculiarities to which I have referred shewn upon its face; and, though his brother was in town the same day, he does not apparently have the slightest consultation with him as to the advisability of making such an investment.

The learned trial Judge refers also to the facts that the attorney who was acting for the plaintiff in the present action had already, at the suggestion of McLaughlin Bros., acted for the bank in suits upon other notes of theirs, as well as for the plaintiff in this action, and that the plaintiff had not been called upon to pay anything to this attorney for the expenses of this litigation. It is possible, no doubt, that a perfectly good explanation of this circumstance might exist, and that the plaintiff may have been informed of the difficulty in which McLaughlin Bros. stood only long after the dishonour of the note, and may have been induced to consent to allow his name to be used in the suit upon the terms that it would cost him nothing, but the circumstance is there, and I cannot say that the learned trial Judge was wrong in noticing it or in allowing it to be added in his mind to the other circumstances of the case which throw doubt upon the good faith of the plaintiff.

There is considerable obscurity in the evidence with regard to how the amount paid for the note was arrived at. The note fell due on 30th April, 1905. It was purchased on 3rd April of that year. It shews on its face that interest is payable annually. One year's interest, therefore, fell due on 27th April, 1904. There is nothing on the face of the note to shew whether this was paid or not when it fell due, although we now know that it had not been paid. The amount paid to McLaughlin Bros. on 3rd April, 1905, was the principal and one year's interest at 8 per cent. However H. B. Peters may have arrived at the amount paid, it is clear that he did not inquire whether or not the first year's interest had been paid, and, speaking for myself, I am of opinion that he assumed that it had not been paid, and that he intended to give McLaughlin Bros. only one

year's interest and to take the whole second year's interest for his brother. This knowledge or assumption on his part that the first year's interest had not been paid furnishes, to my mind, another reason why he should have inquired why it had not been paid, and his omission to do so is at least slight evidence that he did not want to inquire too closely into the facts.

Taking, therefore, all these circumstances together, I am of opinion that quite sufficient doubt is cast by them upon the honesty and bona fides of the plaintiff or his agent to justify this Court in saying that he has failed to meet the burden which the law casts upon him by proving to our satisfaction that he was really honest in what he did and that he did act in entire good faith. The learned trial Judge went further, and found as a fact that he was not a bona fide transferee or holder in due course, and I am bound to say that I am not very much disposed to quarrel with that finding. But it is not necessary to go as far as that, and I content myself with simply saying that the circumstances are altogether too suspicious to justify me in finding to the contrary, and in the plaintiff's favour, that he was in fact a bona fide holder in due course. The appeal should, therefore, be dismissed with costs.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

DUNN v. CALLAGHAN.

Vendor and Purchaser—Contract for Sale of Land—Action by Purchaser for Specific Performance or Damages—Resale by Vendor—Defences—Statute of Frauds—Intoxication—Ratification—Election of Plaintiff for Remedy by Damages—Measure of Damages—Price of Resale—Rising Market—Contemplation of Parties—Time at which Damages to be Estimated—Time of Actual Breach—Cross-appeal—Increase of Damages.

Appeal by defendant and cross-appeal by plaintiff from judgment of SIFTON, C.J., in an action for specific per-

formance of a contract or for damages, awarding plaintiff $1,000 damages.

The cross-appeal of plaintiff was on the ground that the damages should be increased.

The appeal was heard by SCOTT, HARVEY, STUART, and BECK, JJ.

N. D. Mills, for defendant.

E. B. Edwards, K.C., for plaintiff.

BECK, J.:—This is an action by a purchaser claiming, as the statement of claim was originally framed, specific performance of a contract for the sale to him of certain hotel property for the price of $21,000. The agreement was made on 7th November, 1906. A caveat was filed on 7th December, 1906. The action was commenced on 8th July, 1907, and an order thereupon made continuing the caveat, in respect of which a notice to proceed had been given by the defendant. The defendant made a resale of the property to one Laughlin on 12th April, 1907, for $23,000, the completion of which was prevented by the caveat and order continuing it. Plaintiff amended his statement of claim, and claimed also damages. The case was tried before the learned Chief Justice without a jury. The plaintiff at the trial elected to take the remedy by way of damages instead of specific performance, and judgment was given in favour of plaintiff, with $1,000 damages.

One defence to the action was that there was no sufficient memorandum to satisfy the Statute of Frauds. At the argument the Court were agreed that this ground of defence could not be sustained.

Another defence was that the contract was executed by the defendant at a time when he was so intoxicated that he did not know what he was doing, and was incapable of transacting any business, and that the plaintiff was well aware of his condition. The learned Chief Justice found that this defence was not established. I came to the same conclusion, influenced perhaps especially by the evidence of subsequent ratification.

I think, therefore, that the learned Chief Justice was right in holding that the plaintiff is entitled to succeed.

The plaintiff gave notice in pursuance of English O. 58, r. 6, which is not specifically embodied in our Rules,

that he intended on the hearing of the appeal to ask that the judgment be varied by increasing the damages.

The plaintiff urged that the damages should be increased at least to $2,000, on the ground that the sale made in the month of April, 1907—5 months after the agreement—was evidence of the value at the commencement of the action; but furthermore that they should be increased by a much larger sum, on the ground that the evidence shewed that there was "a rising market," and the value of the property at the time of the trial was shewn to be from $26,000 to $30,000.

The question then is, what is the proper measure of damages in an action by a purchaser for breach of a contract to sell real estate, where the sale does not go off for want of title in the vendor?

I am of opinion that the general rule laid down in the leading case of Hadley v. Baxendale, 9 Ex. 341, is applicable equally to the case of land as of goods; namely, where two parties have made a contract which one of them has broken, the daamges which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

In Engell v. Fitch, L. R. 4 Q. B. 669, this general rule was applied to the case of land in the same way as it is usually applied in the case of goods. It is there said: "The measure of damages is the difference between the contract price and the value at the time when the contract was broken" (p. 669), and "the price on resale is evidence of the market value" (p. 668).

Exceptional cases do arise in the case of either goods or land. Robertson v. Dumaresq, 2 Moo. P. C. N. S. 66, 15 E. R. 827, was cited by plaintiff's counsel as shewing that the difference should not be estimated with regard to the date of the breach of the contract, but with regard to the date of the trial, or at least the commencement of the action. That was a peculiar case. It was a proceeding in the nature of an action brought by Dumaresq under a statute of the colony of New South Wales substituting that method of procedure for a petition of right. The facts

were briefly these. The plaintiff was induced to settle in the colony by the promise of the Governor to give him an allotment of certain lands. He was subsequently induced to give up this allotment, on a promise to give him an allotment of certain other lands in Hyde Park Gardens, near Sydney. This was in 1827. In 1831 a succeeding Governor declined to carry out the promise, but offered him other lands, which the plaintiff refused to accept. Negotiations seem to have continued between the plaintiff and the Governor for the time being from 1831 till 1858, when the proceedings were commenced. Evidence was given at the trial of the then value of land in Hyde Park Gardens, which was objected to by the defendant, on the ground that the value should have been taken at the time the alleged contract was broken, in 1831. The evidence was, however, admitted, on the ground, as stated by the Judge at the trial, that the local Act, under which the proceeding was taken, gave a more extensive claim than mere damages for breach of contract, and that the ordinary rule of law was not applicable. A motion was afterwards made for a new trial, on the ground, amongst others, that the damages were excessive and had been assessed upon a wrong principle by taking into consideration the present value of the allotment. The Court said: "The case is not one, we conceive, to which the ordinary rules respecting damages in an action at law apply. The proceeding itself, as already observed, is not in strictness an action; and we are of opinion that in creating this novel remedy with the avowed purpose of enabling this Court, by a trial of the matter in dispute, to do justice between the Crown and the subject in every case referred to us, whether such as a petition of right may extend to or not, the legislature must have intended that whatever compensation was shewn to be demandable for an injury done or a loss sustained, it should be awarded to the full extent necessary to afford redress." The Court then proceeds to call attention to the unusual character, effect, and purpose of the contract. The judgment of the Judicial Committee of the Privy Council on the question of damages was that the proper rule had been applied. The exceptional application of the rule as to the damages in actions for not replacing stock, based on its fluctuating or speculative character, was taken to be a rule justly applicable under the circumstances of the case (see Mayne on Damages, 6th ed., vol. 2, pp. 99 et seq.), in view, it seems to me, of the

obviously speculative character of the scheme arranged between the government and the plaintiff; and, moreover, in the earlier part of the judgment occur these words: "Looking at the manner in which the inquiry was conducted, it is impossible not to see that all parties considered it to be a proceeding differing materially from an ordinary action, both in the considerations applicable to the claim and in the extent to which evidence might be adduced in support of it."

Had it been shewn in the present case that at the time of the contract both parties recognized that what is popularly called "a real estate boom" was in progress, and that the plaintiff was buying for the purposes of speculation, that is, that it was in the contemplation of both parties that the purchaser was buying with the intention, based upon a not unreasonable expectation, of shortly reselling at a considerable profit, and furthermore, had the plaintiff been obliged by reason of the wrongful act of the defendant to accept damages in lieu of specific performance, I think, perhaps, the basis upon which the damages were assessed in Robertson v. Dumaresq might properly have been adopted. After all, it seems to me that that case is little more than an instance of the application of the general rule to unusual and exceptional circumstances. But, although the evidence does appear to shew that there was at the time of the contract "a rising market," it is at the same time clear that the plaintiff bought not with the view of reselling the property, but of holding it and continuing to carry on the hotel business; and there was nothing to prevent the Court from awarding him specific performance had he elected to insist upon that remedy. Now, then, should the general rule be applied to the circumstances of the present case? On 20th November, 1906, the defendant gave the plaintiff notice that he repudiated the contract. The plaintiff, however, was not obliged to accept that notice as constituting a breach of the contract; he was entitled to accept it as such, if he saw fit, but in fact he did not do so. He was entitled, notwithstanding the notice, to look for performance upon the dates fixed by the contract: Frost v. Knight, L. R. 7 Ex. 112. He elected to wait.

Under the contract the plaintiff was entitled to the receipt of the rents of the property which became payable subsequent to the date of the contract. A payment of rent fell due under the lease on 30th November, and monthly

thereafter until 30th June; and on 1st July the plaintiff was, the current lease then expiring, to be entitled to actual possession. I was at first disposed to hold that the measure of damages should be the difference between the contract price, $21,000, and the value, so far as it could be ascertained, on 30th November, 1907, that being the date of the first breach of the contract on the defendant's part, and to find that $1,000 was a fair estimate of the damages upon that basis, but, on further consideration, I am not prepared to dissent from the view expressed by my brother Harvey that for the reasons he has indicated the 1st July should be the date of the breach to which special regard should be had, and, that being so, the damages should be increased to the sum of $2,000.

The judgment of the learned trial Judge should, therefore, be varied by increasing the damages to the sum of $2,000, and otherwise be affirmed, with costs.

SCOTT and STUART, JJ., concurred in the result.

HARVEY, J.:—While I accept in the main the judgment of my brother Beck, which I have had an opportunity of reading, I do not wish to give my assent to the view that the same method of applying the principle laid down in Hadley v. Baxendale, 9 Ex. 341, is to be adopted for fixing the damages for breaches of contract for the sale of real estate as in the case of chattels for which substitutes may be had in the open market. It does not appear to me, however, that it is necessary to decide that point here, for, even if the same method is applied, in my view the date when the value is to be ascertained is not the time when the defendant wrote his letter repudiating the contract, but the 1st July, the date when the defendant was to put the plaintiff into possession of the property, which corresponds most nearly with the date of delivery of goods in a contract for sale of goods, and there is no evidence of any increase in value after that date.

In Frost v. Knight, L. R. 7 Ex. 111, Cockburn, C.J., at p. 112, says: "The law with reference to a contract to be performed at a future time, when the party bound to performance announces prior to the time his intention not to perform it . . . may be thus stated. The promisee, if he please, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and

then hold the other party responsible for all the consequences of non-performance. . . . On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it."

In the present case the plaintiff elected the first alternative mentioned by Cockburn, C.J., and insisted on performance until after the time for the delivery of possession, after the refusal of which he brought his action.

In Brown v. Muller, L. R. 7 Ex. 319, goods were to be delivered in equal quantities in September, October, and November. The vendor shortly after the making of the contract gave notice of repudiation. The purchaser did not accept this notice, but demanded delivery, and after the time of last delivery brought his action. He was held entitled to recover the difference in value between the contract price and the market price on one-third of the quantity of goods at each of the 3 dates fixed for delivery, which was several times greater than the difference in price at the time of the defendant's repudiation.

On these authorities it appears to me clear that the time for ascertaining the market value of the property, treating it as on the same basis as goods, would be 1st July. Several witnesses were called to prove the value of the property on or before this time, and it was shewn that on 12th April an actual sale was made for $23,000, which was prevented from being consummated by reason of the caveat in this case. The witnesses placed the value at sums several thousand dollars higher than this, but they were the assessor of the municipality and real estate agents, and I think their estimates are likely to be over rather than below the price at which the property could have been sold. The price which a person was actually willing to give seems a much safer indication of the actual selling value, and, according to the evidence, very soon after the sale mentioned there ceased to be any activity in real estate, so that the value at that time would appear to be as high a value as the property had before 1st July. It is pointed out that, as the brother-in-law of the defendant was largely interested in this sale, it may have been sold at a lower price than could have been obtained otherwise. This is only a suspicion, and, apart from the evidence of the other witnesses as to the value which I have commented on, has nothing to support it. In my opinion, the evidence fur-

nished by that sale is the best evidence on which to base a conclusion, and, as the price obtained was $2,000 in excess of the contract price, I think the plaintiff should have judgment for that amount.

In my opinion, therefore, the defendant's appeal should be dismissed with costs, and the judgment of the trial Judge in favour of the plaintiff should be varied by increasing it from $1,000 to $2,000.

Defendant's appeal dismissed, and plaintiff's cross-appeal allowed.

ALBERTA.

APRIL 18TH, 1908.

FULL COURT.

LOCAL IMPROVEMENT DISTRICT No. 26 A 5 v. WALTERS.

Assessment and Taxes — "Occupant" of Timber Berth — License from Dominion Government—Local Improvement Ordinance, 1903—Powers of District Council—Resolution — Validity — Money Payment — Commutation — Day Labour—Notice—Posting up—Assessment Roll—Time for Adding Names — Provisions of Statute — Imperative or Directory.

Appeal by defendant from judgment of SIFTON, C.J., in favour of plaintiffs in an action to recover a certain sum of money as being the taxes assessed by the plaintiff in 1905 against the defendant as the "occupant" of certain timber berths held in that year by the defendant under license from the Dominion government.

The appeal was heard by SCOTT, HARVEY, STUART, and BECK, JJ.

O. M. Biggar, for defendant.

M. W. Eager, for plaintiffs.

BECK, J.:—It was conceded by counsel for the defendant that the defendant was an "occupant" of the lands in

question, within the meaning of the statute under which the plaintiffs assumed to make the assessment, viz., the Local Improvement Ordinance, 1903, 2nd sess., ch. 24. Section 49 enacts that "the council may cause to be levied in each year for the general purposes of the district a tax not less than 1¼ cents and not more than 5 cents per acre upon every owner or occupant in the district for all land owned or occupied by him . . . ."

Section 50, that "the rate per acre shall be fixed by a resolution of the council."

Section 51, that "the council shall make or cause to be made an assessment roll containing certain specified information, and that the roll shall be kept at the office or residence of the secretary, and may be inspected at any reasonable time by any ratepayer."

Section 53, that "if any land for which some one should have been assessed has been omitted from the assessment roll . . . the council shall, on the discovery of the omission . . . if within two months from the posting of the roll as herein provided, cause the necessary additions . . to the roll to be made to assess the owner or occupant so omitted . ."

Section 54, as substituted by the Ordinance of 1904, ch. 8, sec. 8, for an earlier provision, enacts "that the secretary shall complete the assessment roll not later than 15th May in each year, and shall forthwith mail to each ratepayer whose name and address appear on the assessment roll a notice of his assessment . . . ."

The Ordinance of 1904, ch. 8, sec. 6, by way of amendment to sec. 45 of the original Ordinance, provides that the council may make or pass a resolution "regulating the rate of pay for all work done by day labour in the district . ."

The resolution of the council upon which the assessments for the year 1905 were based was passed on 4th February, 1905, and the minute thereof reads as follows:—

"It was moved by Mr. Kraus and seconded by Mr. Ibsen that the assessment rate be 4 cents per acre, 80 cents to be paid in money, and the balance to be worked out by day labour at $1.40 per day of 10 hours, or $2.80 for a man and team. The overseers to give ratepayers 14 days' notice by mail or 3 days in person.

"Any ratepayer failing to appear on the overseer's notice, to forfeit his right to work, and shall pay his tax in money.

"If ratepayers elect to work part of their assessment, they must notify the secretary-treasurer to that effect, and pay 8 cents by 1st May, or forfeit their right to work."

The minute proceeds: "By a resolution of the council it was decided that the councillor for each division be a standing committee to appoint one or more overseers for his division and specify the places to be worked on."

The form of this resolution makes it necessary to advert to some of the earlier statutory provisions which do not appear in the Ordinance, as it now stands. In the Ordinance of 1901, ch. 27, it is provided by sec. 40 that "every person shall pay the whole amount for which he is assessed; but any person may elect to commute for the same or for some part thereof by day labour at the rate of one day's work for each $1.25 of assessment." The following sections provide for notice by the ratepayer of his intention to commute, notice by the overseers to the ratepayer of the time and place when and where he is required to work, etc. This provision was dropped in the revision of the Ordinance represented by the Ordinance now in force.

Again, the word "posting" occurring in sec. 53 of the present Ordinance has reference to a provision of the Ordinance of 1901, which has also been dropped, requiring, in addition to the mailing of the notices of assessment, the posting of a copy of the roll at a school house, or post office, or in a conspicuous place outside the secretary's house.

The secretary in his evidence states that the assessment roll was completed down to the point where the defendant's name first appears thereon on 14th March. The assessment of the defendant was added to the roll on 8th July, in pursuance of a resolution of the council passed on that day, reading as follows: "That the land held under timber limit by Mr. Walters be assessed for improvement taxes, and that Mr. Walters be notified by registered mail; this timber limit being in township 51, range 2, and in this local improvement district."

I think I have now stated the statutory provisions and the evidence so far as required to enable me to deal with the points which it seems to me necessary to consider in order to come to a decision upon this appeal.

The first question in logical order raised for consideration was, whether the resolution of 4th February, 1905, purporting to impose the tax, is valid. It was contended on behalf of the defendant that it is invalid *in toto*, for the

reason that it is obvious upon the face of the resolution that it was not the intention to impose a tax at the rate stated, payable in cash, but included an attempt on the part of the council to re-introduce the right of commutation which the legislature had advisedly withdrawn.

Then it was urged that, even if the resolution be taken as valid, no individual assessment would be valid to which the privilege of commutation conferred by the resolution was not applicable, inasmuch as there would be discrimination, and the burden or obligation would be unequal. The original resolution passed in February, 1905, limits the privilege of commutation to those who should give notice of election to commute by 1st May. The defendant, being placed on the assessment roll only in July, was afforded no opportunity of exercising an election.

It is unnecessary for me to express an opinion upon either of the two grounds above stated, in view of the further ground taken, namely, that the addition of the defendant's name to the roll was invalid, inasmuch as made more than two months after the completion of the roll.

The words of the section (53) authorize such additions "if within two months from the posting of the roll as herein provided." As already pointed out, the word "posting" referred to a "posting up" provided for in a section of the earlier Act which was dropped. In the Ordinance as it now stands, this word cannot have the meaning it had in the Ordinance as it originally stood, but I think an analogous meaning ought to be given to it, if it is possible, and that it should now be taken to refer to the secretary's act of depositing it in his office on completion (sec. 51). According to his own evidence, this was on 14th March, and it seems to me that date must be accepted as the date of completion. If this be so, then the addition of the defendant's name, being made upon 8th July, was not made within the limited period of two months allowed for that purpose by the Ordinance. Is that provision with reference to time imperative or merely directory?

The general principles applicable are laid down in succinct terms in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 26, tit. "Statutes," pp. 689, 690, as follows: "Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity,

and despatch in the conduct of public business. Provisions in regard to the assessment and collection of taxes and the measures preliminary thereto which are intended for the protection of the taxpayer, to ensure an equality of taxation, and to prevent a sacrifice of his property, are mandatory; while, on the other hand, those intended simply for the guidance of the officers and to promote the efficiency of their work are directory."

In Trenton v. Dyer, 24 S. C. R. 474, it was held, while recognizing that a provision as to the time of the delivery of a collector's roll by one officer to another was merely directory, that a provision requiring the roll to be certified by the former officer before delivery was mandatory. Had the assessment in this case not been completed by 15th May, I think that it could have been validly completed after that date. I am of opinion, however, that the provision that the correction of omissions is to be made within a limited interval of time is "one introduced for the protection of the ratepayers, and therefore obligatory:" per Strong, C.J., in Trenton v. Dyer, supra.

On this last ground, I am of opinion that the judgment appealed from ought to be allowed with costs, and judgment entered for the defendant with costs.

HARVEY and SCOTT, JJ., concurred.

STUART, J. (after setting out the resolution of the council of 4th February, 1905):—According to the evidence of the secretary of the district, who was also assessor, the assessment roll was completed about 14th March, but the notices to the persons assessed were sent out by mail at various times up to 17th May. On 8th July, 1905, another meeting of the council was held, and the following resolution was passed: "It was moved by Mr. Ibsen and seconded by Mr. Kraus that the land held under timber limit by Mr. Walters be assessed for improvement taxes, and that Mr. Walters be notified by registered mail, this timber limit being township 51, range 2, and in this local improvement district."

In accordance with this resolution, the secretary entered the defendant Walters's name upon the roll in respect of a large tract of land held by him under a timber license, and for which it is admitted he was during that year properly assessable. This was apparently done on 10th July,

and notices were sent to him on that day. The amount of the taxes claimed by the district from Walters was $617.50, and it is to recover this sum that this suit is brought.

The Chief Justice gave judgment for the amount claimed, and the defendant appeals.

The first objection taken by the appellant is that the assessment was irregular, and not authorized by the Ordinance. I am not disposed to think that we should uphold this contention. Upon a fair reading of the resolution of 4th February, I am of opinion that its real effect is, and was intended by the council to be, that a rate of 4 cents an acre should be imposed upon all the assessable land in the district. It is admitted that if the resolution had stopped at the word "acre" in the second line, there could be no question of its validity. But it is contended that the addition of the subsequent words shews an intention never to impose an actual rate, all payable in money, upon the ratepayers, but simply to impose a tax of 80 cents in money and an obligation to do a certain amount of statute labour in addition, which of course the council were not authorized to do. I cannot read the resolution in that sense. It will be conceded that if separate resolutions had been passed dealing with the question of commutation, the question of the validity or invalidity of these latter would not have affected the validity of the assessment of 4 cents an acre. I think we should not scrutinize too closely the mere form in which the actions of district councils are put, and that we ought to treat this resolution in question as if it were separated into distinct resolutions upon each subject matter dealt with by it. Moreover, even reading it as a whole, it is clear to my mind that the council did intend to impose a full obligation to pay 4 cents an acre in money in the first instance, but merely in the same breath, as it were, made and put upon record a general offer to the ratepayers of a strictly limited and conditional option of making a contract with the district to do work for the district at a certain rate of pay, which the district would accept as payment of the rate, but that, connected with this general offer, was a distinct notice that if the ratepayers did not take it up according to its terms, the obligation to pay in money would be final. There is nothing in the Ordinance forbidding the council from making such an offer or such a bargain. Previous legislation, since repealed, had given the ratepayers the right to commute in this way, and I think

the resolution merely contains an intimation that the right of which the legislature had deprived them would be extended to them by the council itself upon certain conditions. There is a further question in my mind, and that is, whether the resolution of the council can properly be considered as the actual assessment. The council has power by sec. 50 to fix the rate per acre, but I would rather be inclined to think that the entry of the names and of the property on the assessment roll in reality constitutes the assessment. The original roll which was produced before us does shew a cash assessment against each parcel of land, and the only reference to work is in columns which refer to what has been paid, which of course could only be entered long after the assessment. For these reasons, I think the original assessment was not invalid or irregular.

But I am of opinion that the appellant must succeed upon the second objection, that the addition of his name to the assessment roll was made too late. Section 53 of the Ordinance says: "If any land for which some one should have been assessed has been omitted from the assessment roll, or any error made in the particulars contained therein, the council shall on the discovery of the omission or error, if within two months from the posting of the roll as herein provided, cause the necessary additions and alterations to the roll to be made to assess the owner or occupant of the land so omitted or correct the other error."

There is a difficulty about the words "the posting of the roll as herein provided," because there is no provision in the Ordinance as it now stands for "the posting of the roll." Originally in the Ordinance of 1898, by sec. 18, it was provided thus: "Upon completion of the assessment roll, the overseer shall post a copy of the same at the school house or post office, if there is one situate within the district, or (if there is no such school house or post office) in a conspicuous place in the district; and, if he deem it expedient to do so, the overseer may mail to each non-resident land owner within the district a notice of his assessment. The owner shall keep the original assessment roll at his residence open to inspection."

In 1901 this provision was continued, except that mailing of notices to non-resident ratepayers was made obligatory instead of optional. In 1903 (2nd sess.) the provision as to posting in a conspicuous place was omitted altogether, but, by sec. 51 (2), the provision as to keeping the

roll open to inspection was continued, and by sec. 54 it was made obligatory to mail notices to all ratepayers, resident as well as non-resident. By some accident, in the section of the Ordinance of 1903 referring to corrections of omissions, a corresponding change was not made, the words "the posting of the roll" were retained, and they still stand in the unofficial consolidation. We are, I think, bound, if possible, to give some intelligible meaning to the words as they now stand in sec. 53, and, in view of the history of the words, and particularly of the fact that, even in the original section, the provisions as to mailing and keeping the roll open for inspection were joined with the provision as to posting, clearly as a means of giving publicity to the roll, I am of opinion that the Court can fairly interpret the words as now referring to the first moment when the completed roll is ready for inspection by the public.

The roll was completed, according to the secretary, on 14th March. The defendant's name was not added until 10th July, long after the period of two months had expired. The power to add further names is given only conditionally; and, in my opinion, the condition must be observed, and, if it is not observed, there is no authority to make any addition at all. It was suggested that this is a case for drawing the distinction between the directory and imperative provisions in a statute, and that the provision should be considered only as directory. But I cannot accept this view. I think the provision is clearly imperative.

If it were not for sec. 53, there would be no authority to add anything at all to the completed roll. Express authority needed to be given, and that authority was given subject to a limitation. If the council were permitted to exceed that limitation, then the result would be that we should be amending the statute, and enacting ourselves that additions may be made at any time. This, I think, the Court has no power to do. Other grounds were taken in support of the appeal, but I do not think it necessary to deal with them.

I think the appeal should be allowed with costs, and that the judgment entered below should be set aside and judgment entered dismissing the plaintiff's action with costs.

BRITISH COLUMBIA.

APRIL 10TH, 1908.

REX v. SMITH.

Criminal Law—Evidence—Proof of Blood Relationship on a Charge of Incest.

Case stated by WILSON, Co. C.J., on acquittal of the prisoner on a charge of incest, in the County Court Judge's Criminal Court at Revelstoke, on 25th February, 1908.

The portion of the case stated material to this report was as follows:—

"The only evidence given as to the relationship of parent and child was that of the girl herself, who stated that the man in the prisoner's dock (the accused) was her father, and also the fact that for 7 or 8 months the accused and the child lived together apparently as father and daughter. I held that that was not sufficient proof of relationship, and that on that ground the prisoner should be acquitted."

The case was heard at Vancouver on 10th April, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Maclean, K.C., for the Crown. The girl swears the accused is her father, and another witness swears that the two lived together as father and daughter. That evidence, not being rebutted, amounts to a legal certainty until displaced.

Macdonell, for the prisoner.

HUNTER, C.J.:—I think the learned County Court Judge was perfectly right in holding that the relationship should be fully proved. The only evidence to be considered here is that of the child herself, which is not conclusive.

IRVING, J.:—I have a different opinion. In my view, it was competent for the learned Judge to convict on the evidence before him. In criminal cases it is only necessary that the evidence should be sufficient beyond reasonable doubt.

MORRISON, J., concurred with HUNTER, C.J.

Acquittal affirmed, IRVING, J., dissenting.

THE

Western Law Reporter

VOL. VIII. TORONTO, JUNE 1, 1908. No. 8.

MANITOBA.

MACDONALD, J. APRIL 27TH, 1908.

TRIAL.

STIRTON v. HARVEY.

Promissory Notes—Indorsement for Limited Purpose—Failure of Purpose—Fraudulent Use by Maker for another Purpose—Holders in Due Course—Notice—Knowledge.

Action to recover the amount of two promissory notes for $500 each made by W. G. Stirton, the son of one of the plaintiffs, and indorsed by the defendant.

The defendant by his statement of defence set up several defences, and on the trial asked and was allowed to amend by setting up the defence of forgery.

A. B. Hudson and E. L. Howell, for plaintiff.

J. K. Dysart, for defendant.

MACDONALD, J.:—W. G. Stirton was employed as a travelling agent for the plaintiffs, and while thus engaged misappropriated moneys collected for the plaintiffs, and otherwise by reason of misconduct became largely indebted to them.

The defendant was at the time engaged in the real estate business in the city of Toronto, doing business under the name of "The Winnipeg Realty Company," and whilst so engaged was interviewed by W. G. Stirton, who represented that he could do some business in the way of selling real estate. Defendant suggested that if he (Stirton) could raise $1,000 he would give him an interest in the business.

when Stirton intimated that he could get the money from the plaintiffs with the assistance of the defendant, and asked the defendant to assign certain contracts of sale controlled by him as collateral security, and that he would give his notes for $500 each and get them indorsed by the plaintiffs, and in this way raise the $1,000 required in the business. Saskatchewan Valley land contracts were assigned by the defendant, and these assignments, together with the original contracts, and two promissory notes each for $500 made by W. G. Stirton in favour of the plaintiffs, and indorsed by the defendant, were handed to W. G. Stirton by the defendant for the purpose of borrowing $1,000 from his father or the plaintiffs for the purpose of putting into the defendant's business.

Within a few days afterwards W. G. Stirton called upon the defendant at his office and handed back what the defendant thought were the papers so signed by him, and advised the defendant that his father would not do anything for him.

The defendant handed the original contracts to Frank W. West, a book-keeper in his office, to place on file, and, taking a look at the assignments and notes, tore them up and threw them away. The notes he signed were made out and signed in the month of May, 1905, whereas one of the notes sued on is dated 17th July, 1905, at a date when, I am convinced, the defendant was not in Toronto. The indorsements of the defendant on both notes I am satisfied are the handwriting of the defendant, but how the maker of the notes got possession of them remains unexplained. The defendant was, no doubt, convinced that he destroyed the notes he gave W. G. Stirton as well as the assignments of the contracts referred to.

W. G. Stirton, according to the evidence of the plaintiff Dyer, sent the notes to the plaintiffs, and the latter assert that they were sent to apply on the former's indebtedness to them.

They say that they had no knowledge of the purpose for which the notes were given by the defendant to W. G. Stirton, and that they are bona fide holders in due course.

I am of the opinion that the plaintiffs are not holders in due course. The notes in the first instance were given for a limited purpose, and that was to raise money for the benefit of the defendant's business, and I am satisfied the plaintiffs had knowledge of that fact. The assignments

(exhibits 19 and 20) were forwarded them, and those are the assignments executed by the defendant at the time he indorsed the notes. The original contracts, of which these are assignments, were returned, but the assignments of them were retained by the plaintiffs, and are put in evidence by them in proof of the defendant's signature. That W. G. Stirton has practised an attempt at a daring imposition upon the defendant there is not a doubt, and it is equally clear to me that the plaintiffs are endeavouring to gain the benefit of that imposition with a knowledge of the circumstances surrounding it.

I dismiss the action with costs.

MANITOBA.

MACDONALD, J. APRIL 27TH, 1908.

TRIAL.

ROY v. HENDERSON.

Negligence — Injury to and Death of Person Taking Sand from Sand Pit—Falling in of Roof of Pit—Liability of Owner of Pit—Knowledge of Danger—Warnings—Fault of Deceased.

On 17th February, 1906, Jean Baptiste Roy received injuries in a sand pit, stated to be owned by the defendants D. C. Henderson and Janet Henderson, from the effects of which he died the same day, and the plaintiff sued as the administrator of the estate and effects of the deceased, on behalf of and for the benefit of himself and the father of the deceased, to recover damages for his death.

J. R. Haney and A. C. Campbell, for plaintiff.

A. E. Hoskin and E. Beveridge, for defendants.

MACDONALD, J.:—The deceased died a bachelor [illegible] the age of 20 years and 10 months.

The defendants D. C. Henderson and Janet H[illegible] I find, were the owners of the sand pit, and [illegible] sand out of it to the deceased and a number of [illegible] tomers at the time of the accident. The [illegible] time under the management of the defe[illegible] Davies, and one Lamont, both of whom [illegible] the other defendants.

The deceased drove into the sand pit on the morning of 17th February, 1906, at about 10 o'clock in the morning, for a load of sand. A number of loads had been taken out the same morning before the arrival of the deceased, and so much sand had been excavated and taken away that the roof of the pit projected and was overhanging some 5 to 7 feet. While the deceased was loading his sleigh box with sand, this roof fell upon him, causing the injury from which he died, and the plaintiff sues to recover damages for his death.

The custom of those looking after the pit was to break down the roof every evening after it was closed for business, and clean out the earth so fallen, and have it ready for business and safe for the operations of the following morning. This was done on the evening of 16th February, 1906, after the other work of the pit had been concluded. This, it would appear, was the only time of the day when this was done, and whether there was more sand taken and a greater excavation made on the morning of the accident, does not appear, but it was generally conceded amongst the customers of the pit for some little time before the accident that the roof was in a dangerous condition, and I must find as a matter of fact that the unfortunate young man who lost his life knew of the danger and the risk he was taking. A warning was given by Lamont 10 or 15 minutes before the roof fell, and men who were working on either side of the deceased heard the warning and got away. The danger was so obvious that the men were advised not to back their sleighs under the overhanging earth. Some of them would not run the risk and went away without taking any sand, and some left after the warning with part loads of sand, considering the situation too dangerous to take chances on getting full loads. Under these facts, are the defendants liable for damages for the death of the young man killed?

An occupier of premises who invites persons to do business on such premises is under an obligation to keep them in as safe a condition as the character of the business carried on there will permit.

The excavating from the sand pit in question resulted of necessity in working under the surface, leaving a portion of the surface undisturbed, thus forming a roof over the pit, extending as the excavating proceeded. The customers of the sand pit were the persons who created the danger,

as every load taken by them from the side of the pit added to the extension of the roof, and they must have known that there was a limit beyond which the projecting roof would not stand unsupported.

With a knowledge of all the dangers connected with the taking of sand from the pit in its then condition, and in the face of the warnings that were given to all those in it before the accident, I am forced to the conclusion that the unfortunate man whose young life was sacrificed was himself to blame for not being governed as were the others who made their escape before the fatal accident.

The action must be dismissed with costs.

MANITOBA.

CAMERON, J. MAY 1ST, 1908.

TRIAL.

FOULDS v. BOWLER.

Will — Action for Revocation of Probate of Will and to Establish Later Will—Authenticity of Document Discovered Nine Years after Testator's Death — Evidence — Handwriting—Experts.

Action to set aside probate of a will and to establish a holograph will alleged to have been executed at a later date.

A Haggart, K.C., for plaintiff.

G. D. Minty, for the defendants the Bowlers.

T. L. Metcalfe, for defendant W. Foulds.

E. Loftus and J. W. E. Armstrong, for defendant Mulock.

H. W. Whitla, E. J. Tarr, and R. W. Craig, for other defendants.

CAMERON, J.:—George Foulds died 4th December, 1898, leaving a will dated 28th November, 1898, whereby, after bequeathing a legacy of $2,000 to his nephew William Foulds and a legacy of $1,000 to his daughter Josephine Foulds, he devised the residue of his estate to the defendant Emily Bowler "for the use of herself and her two children William and George," who are also defendants in this action. The testator had maintained illicit relations with the defendant

Emily Bowler from the year 1884. She left Winnipeg after the testator's wife returned in 1885 from a visit to England lasting some years, and thereafter lived in Minneapolis and was living there with her two children at the time of his death. George Foulds abandoned his wife and children in 1887, and thereafter until his death lived in rooms in a building owned by himself in the city of Winnipeg, and also at times resided in Minneapolis with Emily Bowler, for whom he kept up an establishment there. He left a widow, Isabella Foulds, two sons, James Whitely and William Robert, and one daughter, Josephine, all of them defendants in this action except James Whitely Foulds, who is plaintiff. Probate of the above will was issued on 27th December, 1898. An action to set aside this will on the grounds that execution thereof had been procured by fraud and undue influence was forthwith commenced in this Court on 28th December, 1898, by Isabella, James Whitely, and William Robert Foulds against Emily Bowler; Josephine Foulds, then an infant under the age of 21 years, being a party defendant. This litigation was brought to a close by an agreement entered into at St. Paul, in the State of Minnesota, on 6th October, 1899, and by a consent judgment pursuant thereto entered 10th October of the same year, in which it was declared that the above will was valid and binding, and by which, subject to the payment of debts and legacies, substantially one-third of the residue of the estate was given to Isabella Foulds and two-thirds to Emily Bowler.

After this settlement Isabella Foulds resided in Winnipeg until apparently about two years ago, when she went to Vancouver, accompanied by her son James Whitely and her daughter Josephine, both of whom lived with her there. The other son married before his father's death, and, having left Winnipeg, has been living in Fernie, Vancouver, and Seattle.

The plaintiff, James Whitely Foulds, testifies that in the morning of 21st October, 1907, in the house in Vancouver occupied by his mother, his sister, and himself, he found the document of 2nd December, 1898, propounded in this action as the last will and testament of George Foulds. He took the document up and shewed it to his mother in her bedroom and shewed it to his sister later the same day. He says he found it in a japanned iron box, formerly belonging to and used by his father as a receptacle for papers,

which was removed from his father's rooms to his mother's house the day following his death, and ultimately taken with other effects to Vancouver. He says he was looking into the box to destroy old papers in it, when he discovered the document in question, and gives no other explanation of the failure to sooner discover it than that such failure was due to carelessness on his part, though it appears in the evidence that the testator's papers had been ransacked and examined in connection with the litigation previously mentioned, and that many of them had been burnt.

This document is in the words and figures that follow: "Winnipeg, Decr. 2, 1898. I, George Foulds, will and bequeath all of my property to my three children, William Robert, James Whitely, and Josephine Foulds, appointing my eldest son William Robert Foulds sole executor of this my last will which revokes all other wills made by me. I direct my executor to pay Mr. and Mrs. Beverley, of Fountain street, Winnipeg, one thousand dollars for past kindness to me. George Foulds."*

This action is brought by James Whitely Foulds asking that the will of 28th November, 1898, be declared void, that the probate thereof be revoked, and that it be declared that the document of 2nd December, 1898, is the last will and testament of George Foulds.

It appears clear upon the evidence contained in the voluminous correspondence filed, and upon the evidence of Mr. Mulock (who prepared it after several consultations and making four drafts), that George Foulds was, in the instrument of 28th November, 1898, deliberately carrying out testamentary intentions previously entertained by him. It is also clear that there can be no question as to his testamentary capacity; that that instrument was duly proved, and probate thereof issued on 27th December, 1898; and that the action to set it aside, commenced 28th December, 1898, was terminated by the agreement of 6th October, 1899, and by the judgment of this Court entered 10th October, 1899, to which Isabella, James Whitely, and William Robert Foulds by counsel, and Josephine Foulds by her guardian, were consenting parties. This present action is brought to establish the document of 2nd December, 1898 (found 21st October, 1907, nearly 9 years later) as the testator's last will

*By R.S.M. 1902 ch. 174, sec. 10, "A holograph will, wholly written and signed by the testator himself, shall be subject to no particular form, nor shall it require an attesting witness or witnesses."

and testament, and I am now asked to set aside the will of 28th November, the probate granted by the Surrogate Court, and the judgment of 10th October, 1899. It is only necessary to state these circumstances to draw therefrom the imperative conclusion that the plaintiff, in order to succeed, must present in support of the allegations contained in his pleadings, evidence clear, unequivocal, and unimpeachable in all its essential parts.

I must, therefore, put to myself this question: Does the evidence marshalled in support of the plaintiff's case appeal to my mind with such compelling force that I would, clearly and beyond question, be justified upon that evidence in setting aside the deliberate and proved instrument of 28th November, 1898?

It was strongly urged at the trial that, after the execution of the instrument of 28th November, the testator suddenly and completely changed his mind, and that such change is evidenced and declared by his statement in the concluding portion of his letter to Emily Bowler of 29th November:—

"You have much to say about the property I am giving you—and ask me if I could not get loan at S. V. & Co. If you do not choose to do as I want you and ask no questions you can do as you like. I told you I had no money at present. Your selfish conduct is very different to mine regarding my will."

Is it possible that his mind, irritated at a display of greed on the part of Emily Bowler, or moving from some other cause, turned in his dying hours to the children of the wife he had wronged? Evidence is not wanting that he regarded his children, particularly his daughter, with affection, and it would be strange, indeed, if that were not so. Did he decide to make to his lawful children, and, possibly, through them, to his wife, the only restitution in his power for the wrongs he had inflicted upon them? It might be well for the memory of the testator, the sordid and repellant details of whose life have been laid bare, if it could be found that such a change of intention, justly recognizing his legitimate offspring, was made manifest. But I find no trace of it. Relentless hostility to his wife is persistently displayed to the very end, and he shews himself, in his later correspondence, suspicious of his sons. The expression in the letter of 29th November refers merely to the Minneapolis property which he had given to Emily

Bowler, and on which it was proposed to raise a loan. There is no question about that. The statements of the testator made to Mr. Mulock (who reminded him of the claims of his lawful children upon him) at the time of the preparation and execution of the instrument were clear and emphatic. He yielded so far as to give, grudgingly, a legacy to his daughter. But nowhere in the evidence do I find the slightest ground for holding that after 28th November there was any indication of a change of testamentary intention on the testator's part. In fact in this very letter of 29th November there is the significant and decisive statement—"My will was signed last night. I am glad."

Finding absolutely no evidence of a change of intention outside the words contained in the instrument of 2nd December (which only came to light last October), I now turn to a consideration of that document itself. The evidence relating to its discovery has already been referred to. Much then depends upon the evidence of the witnesses James Whitely and William Robert Foulds. The value of their testimony is at once impaired by their direct and positive interest in the result of this litigation. In considering their evidence I have proceeded without keeping in view the evidence of the Chief Justice of Appeal, of Mr. Justice Mathers, and Mr. E. L. Howell, except in so far as that evidence dealt with the question of retainer raised by the pleadings, and with matters of fact put in issue thereby.

Dealing in the first place with the evidence of the plaintiff, I must state that his conduct, language, and demeanour in the box were not such as to leave a favourable impression, or invite confidence. It appears that he denied that he was a party to the former suit to set aside the will of 28th November, and that he denied that he had signed any papers connected therewith, until he was confronted with his affidavit on production made in that suit. He denied that he saw or copied Emily Bowler's letters to his father before the latter's death, yet copies of these were undeniably in his solicitors' hands before that event. He denied that he was in Howell, Mathers, & Howell's office between the Monday after his father's death and the compromise of the action to set aside the will, though he must have gone there to sign his affidavit on production. These and other similar discrepancies, together with his unsatisfactory demeanour in the witness box, go far to undermine my confidence in this plaintiff's character and evidence.

Several statements made by the plaintiff, though uncontradicted, did not strike me convincingly. He deliberately stated in the box that he stayed in his father's room in his last days at his father's request, and that his father told him he would have no reason to regret it. Basing my judgment on the correspondence and the other evidence in this case (excluding consideration of the evidence given by the Chief Justice of Appeal), I refuse to accept this statement as founded on fact.

The following question was asked of and answer given by the plaintiff:—

"Q. How did he appear on Saturday night?

"A. He seemed to be failing all right. It was in the middle of the night I was disturbed; about 2 or 3 o'clock in the morning on Sunday I heard him calling upon God, and it disturbed me, and woke me up, and he called on God and said, 'God have mercy on my poor soul,' and he said, 'Willie, Whitely, and Josie, my little queen.'"

To my ear, this theatrical statement, brought out in this case for the first time at the trial, rang false; as also did his further volunteered remark that these words remained indelibly stamped upon his mind. I cannot resist the conclusion that these words were thought out and rehearsed for the occasion. In my mind, the resulting effect was seriously to impair the credibility of the witness on every vital matter in which he was not susceptible of direct contradiction. I refuse, therefore, to accept his account of the finding of the document of 2nd December.

I need not deal at length with the evidence of William Robert Foulds. He admits a defective memory, having had no recollection, until he came here for this trial, of his connection wtih the former suit. He did not recall taking or copying letters from Emily Bowler to his father, but when handed the actual copies made by him he admitted the fact. He swore that, to the best of his belief, he never signed the paper authorizing the settlement, and then immediately admitted that it was likely that he did. The question of direct interest in the litigation being involved in his case also, I cannot bring myself to place reliance upon his evidence, and I hold that it does not in any way corroborate or strengthen the plaintiff's statements, but on the contrary adds an element of weakness thereto.

At the trial I gave my closest attention to the evidence of the witnesses who testified on the subject of handwrit-

ing, whether speaking from actual knowledge of the testator's writing or as experts. As to the latter, the impression left upon my mind is, that, even when it is obvious that the witness is speaking in good faith (and in this case it unquestionably seemed to me that all of them were testifying with the utmost good faith and to the best of their judgment), and is speaking with an anxiety to preserve an impartial attitude, there inevitably arises an unconscious tendency to uphold argumentatively a conclusion once adopted. The science itself, if it can be so called, of passing upon the authenticity of a disputed writing by means of comparison, has inherent weaknesses. The experts themselves tell us that no man ever twice writes his own signature precisely alike, and it is unquestionably possible that experts themselves may be deceived by clever forgers and by other experts. The value of the evidence of each expert therefore becomes more or less impaired under cross-examination, and when they confront each other in equal or nearly equal numbers they tend, in the mind of the average man, to neutralize each other.

But I have carried away from the trial some impressions arising from the evidence regarding the handwriting which strike me as important. The general appearance (or pictorial effect, as it is called by Dr. Ewell) of this document of 2nd December does not impress my vision as the authentic handwriting of the testator, and this is, practically, the sole test applied by the army of experts employed in banking institutions. Mr. Hunter, as a practical banker of long experience, is clear on this point. The differences that strike the eye may not be easily definable in words. All the experts called, to a greater or less extent, share in this opinion. In addition to this, I consider the test of superimposition of the signature in the document of 2nd December upon the same words in the body of the document as of importance. The coincidence of the words and letters is not, it is true, mathematically exact. That would be impossible or at least highly improbable. And it is true that the reason for employing this method is not altogether clear. Yet the coincidence remains—a coincidence between signatures which themselves do not closely resemble the authentic signatures. It is clearly a circumstance of suspicion.

This test of superimposition was emphasized by Dr. Ewell, who also demonstrated by an acid test the undisputed

fact that the ink in the writing of the document in question and that of the letter signed "Harold" dated 29th November were composed of different chemical constituents. No explanation was offered to account for this fact, and it remains a disturbing element of suspicion.

The writing of the document of 2nd December is, in my opinion, different from that of the letters signed "Harold" dated 25th, 27th, and 29th November. A casual examination of the letter would indicate a weakness on the part of the writer, judging from earlier standards furnished, but the document of 2nd December is written firmly, steadily, and heavily. I cannot accept as an adequate explanation of this difference that the nature of the document would require more careful writing. In this respect it can, in fairness, be contrasted with the formal writing known as "The Monument Builder," filed as an exhibit, and from which it widely differs. In fact, the writing in the document in question differs from that found in any of his letters written in 1898, so far as I have been able to examine them.

I do not now undertake to go fully into various other discrepancies pointed out with reference to the punctuation; the methods of holding the pen; the figures; the slope of the letters; the shapes of the letters and of combinations of letters; the margins upon the left side of the document in question and of the letters; the apparent carelessness in the authentic signatures and writings as compared with the precision and laboriousness shewn in the writing of the document in question, and the numerous other points of similarity and dissimilarity brought out and dwelt upon at length by the expert and other witnesses and by counsel.

After giving the closest attention in my power to the voluminous and minutely detailed evidence, after having examined to the best of my ability the signatures, letters, and papers put in evidence, and bearing in mind the singular circumstances alleged to account for the existence, preservation, and belated discovery of the document in question, together with the other circumstances making up the history of the case, I am prepared to hold and I do hold that the document of 2nd December, propounded in this action, is not of the handwriting, and the signature thereto is not the signature, of George Foulds.

Let me add that I do not wish to reflect in any way upon the evidence of the defendants Isabella and Josephine Foulds. I could not find it in my mind to do otherwise than believe that their evidence was given without reservation and with a desire to tell the truth to the best of their recollection.

An attempt was made to connect the plaintiff directly with the construction of the spurious instrument. In my judgment that attempt completely failed. As I deal only with the evidence presented, I venture into no speculation as to the origin of the document.

The action must be dismissed with costs to the defendants the Bowlers, William Foulds, and W. R. Mulock.

MANITOBA.

MACDONALD, J. MAY 4TH, 1908.

TRIAL.

BENNETTO v. CANADIAN PACIFIC R. W. CO.

Railway—Lands Required for—Offer of Price—Acceptance—Time—No Necessity for Arbitration—Res Judicata—Persona Designata.

Action to recover $6,700 for lands taken by the defendants for their railway.

J. E. O'Connor and H. P. Blackwood, for plaintiff.

W. H. Curle, for defendants.

MACDONALD, J.:—On 11th August, 1904, the Board of Railway Commissioners for Canada, under and by virtue of the Railway Act of 1903, ordered that the defendants be authorized to construct a track or tracks and to take and appropriate for that purpose certain properties, of which the property in question in this action is a part.

On 22nd October, 1904, the defendants, in pursuance of the Railway Act, deposited in the land titles office, district of Winnipeg, the plan, profile, and books of reference, together with the orders of the Board of Railway Commissioners.

On or about 10th November, 1904, the defendants, in pursuance of secs. 152 and 154 of the Railway Act, served a notice upon plaintiff, describing the land to be taken, and declaring their willingness to pay to the plaintiff $6,700 as compensation for the land and the taking thereof. This notice also advised the plaintiff that, if this offer should not be accepted, the defendants appointed as arbitrator Robert Thomas Riley, of the city of Winnipeg. The plaintiff, on or about 30th June, 1905, accepted the offer made by the defendants. No proceeding had in the meantime been taken by the defendants, but, after acceptance by the plaintiff, the defendants made application to Richards, J., exercising jurisdiction under and by virtue of sec. 159 of the Railway Act, for an order to appoint an arbitrator or arbitrators for the purpose of determining the compensation to be paid to the plaintiff. Richards, J., decided that the acceptance on 30th June, 1905, of the offer made by the defendants was a compliance with sec. 159 of the Act, and thereby dispensed with the necessity of the appointment of an arbitrator or arbitrators as required by that section.

The plaintiff brings this action to recover payment of the $6,700 so offered by the defendants and accepted by him, and the defendants resist payment, on the ground that within 10 days after the service of the notice of 10th November, 1904, the plaintiff did not, nor did the Keewatin Lumbering and Manufacturing Company Limited, who were mortgagees of the land in question, give notice that he or they accepted the sum offered, as provided by the Act, and thereupon the defendants concluded that the plaintiff did not intend to accept the offer, but had refused the same, and that the defendants made application under sec. 170 and other sections of the Act for a warrant placing the defendants in immediate possession of the lands, and that arbitration proceedings had thereby been commenced, and that, if the plaintiff has any right or title to compensation by reason of the taking and expropriation of the lands by the defendants, the same can be determined only by arbitration, as provided by the Act, and not otherwise, and that this Court has no jurisdiction to determine or award the same.

It is urged on behalf of the plaintiff that the decision of Richards, J., in refusing to appoint an arbitrator because of the acceptance by the plaintiff of the offer of the defend-

ants of $6,700 compensation referred to, places the matter res judicata.

The learned Judge was not acting in his capacity as a Judge of this Court, but under the authority of the Railway Act as a persona designata. He was not empowered or called upon to decide any question of law or fact; his reasons, in my opinion, for declining to name an arbitrator cannot be accepted as conclusive, particularly in view of the fact that there is no appeal from his decision.

It is contended on behalf of the defendants that, under sec. 159 of the Railway Act, the plaintiff must accept the compensation offered within 10 days from the service of the notice, and, if he does not, the only remedy he then has is by arbitration, as provided for by the Act. I do not so interpret that section. The company may, after the expiration of the 10 days, proceed by way of arbitration, but until they do so, the owner is entitled to accept the offer made, and the plaintiff herein did accept the defendants' offer, the price was fixed, and the contract between them is complete, and the relation of vendor and purchaser is as fully constituted as in the case of a regular formal agreement.

There will be a verdict for the plaintiff for $6,700, together with interest from 30th June, 1905, and the costs of this action.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

TEAGUE v. SCOULAR.

County Courts—Action on Promissory Notes—Failure of Plaintiffs to Prove Presentment—Non-presentment not Alleged in Dispute Note—Defence not Open to Defendant.

County Court appeal.

Plaintiffs sued defendant on two promissory notes for $125 and $50 respectively. The particulars on the writ of summons shewed that the plaintiffs as indorsees claimed

payment of the notes from the defendant as maker. Copies of the notes sued on were attached to the writ of summons and referred to in the particulars of claim. The notes purported to have been made by the defendant to the Norris Implement Company Limited, and indorsed by the latter. The notes were payable at the Union Bank of Canada, Winnipeg.

The defendant filed a dispute note, in which he set up payment, that the plaintiffs were not holders in due course, and other defences, but did set up non-presentment of the notes at the place where they were payable.

At the trial the plaintiffs produced no evidence to prove presentment of the notes. The defendant's counsel at the close of the plaintiffs' case moved for a nonsuit, which motion was refused by Myers, Co. C.J., who tried the case. Evidence was then given upon the part of the defendant to prove the defences raised by the dispute note. At the close of the case judgment was entered for the plaintiffs. From that judgment the defendant appealed.

C. W. St. John, for defendant.

A. W. Morley, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE. J.A.:—The only question seriously argued before this Court was that of the plaintiffs' failure or omission to prove presentment of the notes.

By the Bills of Exchange Act, R. S. C. 1906 ch. 119, sec. 183, it is enacted that "where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place." If, however, presentment was admitted by the defence, no further proof of the fact of presentment would be required. The question therefore arises, having regard to the procedure provided by the County Courts Act, has the defendant by failing to deny the presentment admitted the fact or precluded himself from raising it at the trial?

By sec. 95 of the County Courts Act, R. S. M. 1902 ch. 38, no formal statement of the cause of action shall be necessary; all that is required is a statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence. This state-

ment is to be attached to the writ of summons. Copies of such statement are also to be furnished to the clerk, to be attached to the copies of the writ intended for service. In the case of a promissory note, copies of the note are to be furnished for the same purpose (sec. 98). It would therefore appear that in this case the plaintiffs complied with the requirements of the County Courts Act in so far as the statement of claim or pleading is concerned, and the statement of claim in this case must, therefore, be held to have contained all the averments necessary to support an action on the note in question. Upon this point I would refer to the judgment of Killam, J., in Massey Manufacturing Co. v. Perrin, 8 Man. L. R. 457.

By sec. 114 of the same Act, the dispute note entered by the defendant is to be accompanied by an affidavit stating that the defendant has a good defence to the action on the merits, the grounds of the defence, and that he is not entering it merely for the purpose of procuring time. By sec. 116, the defendant shall, in addition, state briefly the nature or the grounds of his defence "so that the plaintiff may not be obliged to produce unnecessary evidence at the trial, and to avoid the expense of unnecessary witnesses falling upon the defendant." If the defendant fails or neglects to state the grounds of his defence in the affidavit accompanying the dispute note, judgment may be signed against him by default (sec. 117).

Section 118 is as follows: "No defence shall be allowed at the trial or hearing except such as shall be stated in the dispute note, unless the Judge shall otherwise order, to the end that justice may be done between the parties."

No amendment was allowed at the trial of this action.

The above sections shew that the procedure provided by the Act, in so far as what may be designated the pleading is concerned, aimed at simplicity, the raising of an issue or issues to be tried, and the saving of unnecessary expense for witnesses. The statement of claim and the grounds of defence are to be stated briefly and simply, but sufficiently to inform the opposite party of the nature of the claim or of the defence respectively. The affidavit accompanying the dispute note must contain every ground of defence relied upon by the defendant. One object of this is to inform the plaintiff what things the defendant denies, so that the plaintiff may not go to the expense of bringing wit-

nesses to prove something which the defendant does not dispute. The proof of such a simple fact as the presentment of a note might necessitate the bringing of a witness hundreds of miles to the place of trial. This would be a serious consideration in the case of a suit in the County Court on a note for a small amount. If the defendant intends to raise the question at the trial, he should with his dispute note inform the plaintiff that he relies upon non-presentment as a defence. If it is not raised as a ground of defence, then the defendant, under the procedure provided by the County Courts Act, may be taken to have admitted that presentment was duly made.

The appeal should be dismissed with costs.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

McINTYRE v. GIBSON.

Attachment of Debts—Attaching Order before Judgment—Affidavit — "Actual Amount of Debt, Claim, or Demand Due and Owing"—Action for Damages for Tort —Application of Rule 759.

Appeal by plaintiff from order of DUBUC, C.J.

The statement of claim set out that the plaintiff occupied, as tenant, land enclosed by a fence, and that the defendant, without the plaintiff's knowledge or consent, removed a part of the fence and omitted to replace the same for several days, and that, in consequence, cattle entered the land, through the places where the fence had been removed, and damaged a large part of the plaintiff's crop of oats and barley. The plaintiff claimed $600 damages.

The plaintiff applied to the Referee, on an affidavit in the usual form, for an order attaching moneys due to the defendant by a third party. The affidavit, after stating the

cause of action, said: "In respect of the said cause of action the defendant is justly indebted to the plaintiff in the sum of $600, after making all just discounts." The Referee granted an order attaching moneys due to the defendant, to the extent of $600. The defendant appealed to the Chief Justice of Manitoba, who set aside the Referee's order. From that decision the plaintiff appealed.

H. Mackenzie, for plaintiff.

H. A. Burbidge, for defendant.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

RICHARDS, J.A.:—Rule 759 of the King's Bench Act requires the affidavit on which an application for a garnishing order before judgment is made, to state the nature of the cause of action and the actual amount of the debt, claim, or demand, and that the same is justly due and owing to the plaintiff by the defendant after making all just discounts. The question is, Does the plaintiff's affidavit, on which he applied to the Referee, shew a debt, claim, or demand that is due and owing?

The words "claim" and "demand," taken by themselves, are perhaps broad enough to include such a cause of action as the plaintiff shews. But they are limited in the Rule by the words "due and owing," and the plaintiff has therefore to shew a claim or demand that is due and owing. In other words, the plaintiff must, I think, shew that he is a creditor of the defendant.

In Grant v. West, 23 A. R. 533, it was held that a person claiming damages for a breach of contract, is not a "creditor" within the ordinary meaning of that word. If that decision is correct, then, undoubtedly, a person whose claim is merely one for damages arising out of tort can not be said to be a creditor.

Where the damages claimed do not depend on any computation of indebtedness, but simply on the view a Judge or jury might take of the loss caused by the defendant's acts, all that exists is a bare right to claim, by action, compensation in respect of the alleged wrong.

What that compensation is to be depends, if the plaintiff proves his case, on the opinion of the Judge or jury

before whom the case is tried. It might by one tribunal be assessed at several times as much as it would by another. In such a case it is not possible to say that, before judgment is recovered, any sum is due and owing, and yet the rights of a plaintiff applying under Rule 759 are limited to cases where he can truthfully state upon oath the actual amount due or owing.

I think, therefore, that the right to proceed under the Rule before judgment is confined to cases where the amount can be definitely ascertained at the time the action is brought.

If a debtor owes two people each a sum of $500, then each, in applying for a garnishing order under Rule 759, would state the claim at practically the same amount as claimed by the other. If a defendant is sued for similar assaults on two different persons, in the same position in life, and who have suffered identical injuries from these assaults, there is no method by which the amount of the assaulted person's claim or demand could be ascertained, for the purpose of proceeding under the part of Rule 759 now under consideration, other than by the plaintiff's fancy. One of such two assaulted persons might state his damage at $100, while the other might claim several thousands.

The object of Rule 759 is to hold property of a defendant until the plaintiff can get his judgment against the defendant, in order that such judgment may not, when got, be fruitless. The remedy is a harsh one from the defendant's point of view. It ties up what may chance to be all of his means, and may work a great hardship to him. The right to exercise such a remedy (which is in the nature of an execution before the plaintiff's claim has been proved) should be strictly construed, and not held to be wide enough to admit the abuses of it which might creep in where the amount of money to be attached may be dependent on the imagination of the plaintiff.

I think the view taken by the learned Chief Justice is right, and that the legislature, in enacting the part of Rule 759 under which the plaintiff has purported to act, meant to confine the remedy given to cases where there are actual debts due and owing to the plaintiff.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

VOPNI v. BELL.

Husband and Wife—Goods Supplied for Household Use—Liability of Wife—Agency for Husband—To whom Credit Given?—Evidence.

Appeal by defendant Catherine Bell from the judgment of the County Court of Winnipeg in favour of plaintiffs.

The action was brought in the County Court against William F. Bell and Catherine Bell. The particulars of claim sued upon were:—

"To goods sold and delivered by the plaintiffs to the defendant at his request and upon his order $292 60

To interest 40

The action was commenced by way of garnishing order and summons, and the Canadian Northern Railway Company were made garnishees. The usual affidavit required for such garnishment was sworn by the plaintiffs' manager, in which he declared that the Canadian Northern Railway Company were indebted to the defendant William F. Bell.

The writ of summons and garnishing order were served upon both defendants, and, neither having entered a dispute note, judgment was entered against both by default. The two defendants were husband and wife, and it coming to the attention of the wife subsequently that judgment had been recovered against her, she applied to the County Court Judge, who set aside the judgment and gave her leave to defend, and the matter came up for trial. Witnesses were called and a verdict was entered against her in favour of the plaintiffs for the full amount as shewn by the particulars above mentioned. Except a money loan, the account sued on was for groceries and butcher's meat supplied to the household.

W. P. Fillmore, for appellant.

R. M. Dennistoun, K.C., and H. M. Hannesson, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

HOWELL, C.J.A.:—At the trial it was proved that the plaintiffs knew that the parties were husband and wife, and were living together when the goods were being ordered. It was further shewn that the plaintiffs acquired the business of one Fredericson, a retail grocer, and that this grocer had been supplying the defendants' household with goods. The plaintiffs' manager swore that in Fredericson's books there was an account against Catherine Bell, and that Fredericson told him the account was a good one and worth continuing. There seems no doubt that in this respect the witness was in error, because, although Fredericson's books were not produced, Mrs. Bell produced many accounts from Fredericson, all of which were filed as exhibits, and which shew that her husband and not herself was the debtor.

The business of Fredericson was carried on by having one of his clerks call on different customers for orders two or three times a week, and it appears that this process was continued after the plaintiffs went into possession, and the same man continued in the business acting for the plaintiffs, and he took orders as before. It seems clear from the evidence that there was no bargain ever made between the plaintiffs and either of the defendants as to the person to whom the goods should be charged, but, when the clerk brought in orders, the plaintiffs took it upon themselves to charge them to the defendant Catherine Bell, and the account so appears in their books, and it seems very strange that, with the account so appearing, and claimed as a debt of the wife, it should be sued upon as a debt of the husband's as shewn by the particulars, and that a garnishing order should be issued against his wages. It appears that after the account had run for some time Mrs. Bell on one occasion borrowed from the plaintiffs the sum of $25 in cash and gave her personal note for this amount, and it further appears that this $25 was by the plaintiffs entered in the account sued upon as an item of the account. It is shewn that subsequently Mrs. Bell received from her husband the sum of $40 and paid it over to the plaintiffs on the general account, and received back her note. It appears also that from time to time accounts were rendered by the plaintiffs to the defendant Catherine Bell in which

she was charged with the goods, and that from time to time she received moneys from her husband, who was a mechanic (their only income being his wages), and these moneys she paid on these accounts so rendered to her in which she appeared as the debtor, but sometimes her husband personally made payments.

As before mentioned, there was no evidence of any agreement that the account should be charged against Mrs. *Bell*, or that she should be liable for or should pay it. There is no pretence that the plaintiffs, or their manager, knew the defendant Catherine Bell before the account was opened and before anything was charged to her. It seems from the evidence that two or three times Mrs. Bell personally ordered goods from the shop, and sometimes her children ordered them. but generally the clerk called at the house for orders. The evidence shews that the wife was fully authorized by her husband to order these goods, and they were necessaries used in the household.

It was the husband's duty to supply the household with the articles purchased. His wife, who was living with him, was his agent duly authorized to pledge his credit in the purchase of these articles, and he was legally liable in an action to recover payment thereof. There is no pretence that the wife ever asked for credit herself, or ever agreed to be the debtor.

It is argued that because the accounts rendered shewed that the wife was made the debtor, she is liable. A similar act was proved in Paquin v. Beauclerk, [1906] A. C. 160, as to which one of the learned Judges said: "The opening of the account in the plaintiff's books in the name of Mrs. Holden or Mrs. E. Holden, or the furnishing to her of bills in that name, are, as it has been said, colourless transactions not helping to a conclusion either way." In that case the wife personally ordered the goods (articles of dress). She did not state, nor did the plaintiffs know, that she was a married woman. Accounts were rendered to her shewing her to be the debtor, and she gave personal cheques on account from a bank account supplied by the husband. The Court were equally divided as to her liability. It is true the case turned to some extent on the English statute, but the case is instructive on the question of presumptions in such cases. The dissenting Judges laid great stress on the fact that the defendant did not, when ordering the goods, disclose her position as a married woman, and the

plaintiff might well have thought her a widow. In that case if the plaintiffs had known she was a married woman living with her husband, even the dissenting Judges would have held, unless a special contract had been proved, that the plaintiffs should have presumed that she was acting as agent for her husband.

In this case the wife was acting as agent for her husband, and the plaintiffs must be presumed to have known it.

The appeal is allowed with costs, and the verdict entered in the County Court against Catherine Bell must be set aside and entered in her favour with costs, and let a counsel fee be given to the defendant in the County Court equal to that allowed to the plaintiffs at the trial.

MANITOBA.

MAY 12TH, 1908.

COURT OF APPEAL.

TRADERS BANK OF CANADA v. WRIGHT.

Injunction—Interim Order—Action on Behalf of all Creditors—Injunction Restraining Debtor from Transferring his Property before Judgment—Pleading—Statement of Claim—Insufficiency—Evidence—Fraud.

Appeal by defendants from order of MACDONALD, J., ante 105, granting an interim injunction.

The appeal was heard by HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.

W. R. Mulock, K.C., and J. W. E. Armstrong, for defendants.

G. D. Minty, for plaintiffs.

HOWELL, C.J.A.:—The statement of claim does not contain a distinct allegation that the defendant Archibald Wright is indebted to the plaintiffs. There is no allegation that there was any indebtedness at the time of the transfer of any of the stock except the Tuxedo Park stock. In an

extraordinary case of this kind, where the plaintiffs seek to restrain the defendant from dealing with his property before the plaintiffs have acquired any charge upon it by way of execution or judgment, it seems to me the allegations should be most clear and most distinct, and the evidence should be of the most substantial kind.

The only evidence in this case that there was any fraud or attempt at fraud or conspiracy to get rid of his property, was a bare allegation made by Archibald Wright to the plaintiffs' Winnipeg manager. He simply states that he has no security to give. From that bare statement we are asked to infer that he has fraudulently disposed of his property, or that he has made a voluntary conveyance. Any statement made by Archibald Wright as to his disposition of property merely by way of casual conversation cannot be evidence of fraud, or indeed evidence of any nature to bind his co-defendant.

On the ground that the pleading is insufficient to support the order made in this matter, and on the ground that there was no evidence of any wrongful acts of the defendants which would entitle the plaintiff to such extraordinary relief, I think the order of the learned Judge should be reversed.

The appeal is allowed and the order for injunction is set aside and the injunction dissolved with costs of motion and of this appeal to be paid to defendants. Plaintiffs to be at liberty to amend within 14 days.

RICHARDS, J.A.:—I concur in the opinion of the Chief Justice, and add the following in support of that view.

The statement of claim does not allege that Archibald Wright, after parting with the assets in question, had not still enough other property to meet his liabilities.

Though the action purports in the style of cause to be brought by the plaintiffs on behalf of the plaintiffs and all other creditors of Archibald Wright, there is in the body of the statement of claim no allegation of the existence of other creditors.

PERDUE, J.A., concurred.

MANITOBA.

MAY 18TH, 1908.

COURT OF APPEAL.

TIRSCHMANN v. SCHULTZ.

Vendor and Purchaser—Contract for Sale of Land—Action for Specific Performance—Duress—Evidence—Interest—Reference as to Title.

Appeal by defendant from judgment of MATHERS, J., 7 W. L. R. 525, granting specific performance.

J. A. McKay, for defendant.

R. M. Dennistoun, K.C., for plaintiff.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—The land in question, 12 acres, forming part of defendant's homestead, had in mistake been improved by plaintiff, his building being on it, and it being in part of his clearing, he being under the impression that it was part of his homestead. An agreement was, at the instance of the homestead inspector, entered into between plaintiff and defendant by which defendant agreed to sell the land to plaintiff for $5 per acre, subject to the consent of the Department of Interior, the land not being patented. The Department gave the consent, and issued the patent to defendant. Then defendant refused to carry out the arrangement. The trial Judge granted specific performance, and in this he was clearly right. Interest at 5 per cent. to be allowed from 1st January, 1908. Reference as to title in event of parties not being able to agree upon it. In other respects appeal to be dismissed with costs.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

GREEN v. WORLD PRINTING AND PUBLISHING CO.

New Trial—Action for Defamation—Verdict for Defendants—Perverse Verdict—Nominal Damages.

Appeal by plaintiff from a judgment in favour of defendants upon the verdict of a jury in an action for libel.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

Charles Wilson K.C., and W. E. Burns, for plaintiff.

D. G. Macdonell and B. P. Wintemute, for defendants.

HUNTER, C.J.:—Following the established practice by which a court of appeal should refrain from prejudging the merits of a case when it orders a new trial—see, e.g., Pearson v. Dublin, 77 L. J. P. C. 1—I shall say nothing as to the merits, the sole question before us being whether or not there should be a new trial.

In respect of his right to hold his verdict, Mr. Macdonell staked his case on the proposition that the article was to be read as a whole, and, while he admitted that there was no foundation for the allegations concerning the Pine river leases, which never had any existence, he maintained that the substance of the matter was that the plaintiff had been guilty of making a corrupt bargain with the applicants contrary to his duty as a Minister of the Crown.

I am unable to see how the sting of the article can be minimized in this way. The fair reading of the article, and that which any stranger would place upon it, was that there had been two distinct transactions, one in respect of the Pine river lands and the other in respect of the Telqua lands, and that in respect of both of them the plaintiff had been corrupt. It cannot be said to be of no consequence that the Pine river charge was unfounded, as it is obvious that, if a similar transaction had taken place as alleged in respect of those lands, the one transaction might be more difficult to explain in the presence of the other, as the existence of the one might, in the mind of the impartial reader, go more or less, according to the kind of mind, to negative the presumption of innocence in the case of the other.

It seems to me, therefore, that the plaintiff suffered a legal wrong in respect of at least one charge for which no justification was attempted, and for which he has not had the remedy given by law, and the verdict therefore cannot be sustained. It was, moreover, in the teeth of the charge of the trial Judge.

There should, therefore, be a new trial.

The appeal should be allowed with costs and the costs of the first trial should abide the result of the new trial.

MORRISON, J.:—The pith of the alleged libel is that the plaintiff, whilst acting as Chief Commissioner of Lands and Works for the province of British Columbia, accepted bribes from certain persons who were having dealings of a public nature with him as such Commissioner.

There were no specific questions left to the jury, and the jury returned a general verdict for the defendant.

The plaintiff was a responsible member of the legislature, and, when charged with such conduct, he is entitled to a vindication of his character, unless the evidence upon which the jury based their verdict is clear and unmistakable.

It is not necessary to make any detailed observations on the evidence, for, as Lord Halsbury, L.C., said in the course of his judgment in Jones v. Spencer, 77 L. T. 537: "It is not desirable that the Judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or state what might or might not have been the proper course to pursue, because such observations are likely to prejudice the trial which may come on afterwards; therefore the matter ought to be left untouched by the tribunal which orders the new trial."

The learned trial Judge charged for the plaintiff as strongly as a Judge consistently could charge. The jury found a verdict directly in face of that charge. Not only that, but, in my opinion, found their verdict unreasonably against the facts left to them.

"The doctrine of setting aside a verdict as being against evidence or against the weight of evidence has lasted in the Courts for an immense time. The criterion to apply is—Did the tribunal which was to decide the question come to the conclusion that the jury have in the verdict at which they have arrived acted unreasonably upon a contrast of the whole of the evidence on both sides?" Jones v. Spencer, supra, per Lord Morris.

"The Court must be satisfied that the verdict is such that it could not be reasonably sustained on the evidence; but I think it has been put too strongly by Lord Esher, M.R., when he represents the state of the law to be this that 'it is nearly impossible to obtain a new trial when the jury have returned their verdict.'"

I think there ought to be in this case a new trial. Costs of appeal to appellant. Costs of first trial to abide result of second.

IRVING, J. (dissenting):—The charge of the learned trial Judge to the jury in this case was on the whole in the plaintiff's favour, and I can see no misdirection in it.

As to the jury finding for the defendants, it was said that the plaintiff was entitled to at least nominal damages, and that, therefore, we should now order a new trial. It seems in England, at any rate, that there is no inexorable rule or practice which precludes a Court from granting a new trial on account of the smallness of damages. Odgers in his work on Libel and Slander (ed. of 1905), says: "There seems to be no case reported in which a new trial has been granted on this ground in an action for libel. But in an action for slander a new trial was granted where the smallness of the amount recovered, i.e., one farthing, shewed, in the special circumstances of that case, that the jury had made an improper compromise and had not really tried the issues submitted to them:" Falvey v. Stanford, L. R. 10 Q. B. 54. In Levy v. Milne, 4 Bing. 195, the Court ordered a new trial because the jury made it manifest that it was their desire to deprive the plaintiff of his costs. That case proceeded on the ground that the jury had misbehaved themselves. In Forsdyke v. Stone, L. R. 3 C. P. 607, where, for a cruel slander which was disproved, a verdict of one shilling only was given, the Judges refused a new trial. In Milligan v. Jamieson, 4 O. L. R. 650, an action of slander, the slander was proved, but the jury virtually said, "We find no damages for the plaintiff, and find a verdict for the defendant;" that is just like the case we are now dealing with. On a motion for a new trial, upon the ground that the verdict was perverse and that the jury should have found for the plaintiff with nominal damages at least, a Divisional Court, consisting of Meredith, C.J., and MacMahon and Lount, JJ., held that a new trial should not be ordered. Meredith, C.J., says in the course of his judgment: "It is, I think, made out that the use by the respondent of the defamatory words was proved and admitted by the defendant, but, granting this, Simonds v. Chelsey, 20 S. C. R. 174, and Scannell v. Clarke, 23 S. C. R. 307, establish that ordinarily where a verdict has passed for the defendant, when it should have been for the plain-

tiff for nominal damages, the Court will not send the case down for another trial. In other words, that a new trial will not be granted to enable the plaintiff to obtain nominal damages. The actions in these cases were, no doubt, on contract, and the most that the plaintiff could have recovered was nominal damages, but I think the principle of the decisions applies here. All that the jury ought to have done, having come to the conclusion at which they arrived, was, putting the case most strongly for the appellant, to have found a verdict for him for nominal damages. They did not find for the plaintiff, but they found for the defendant, and I think, applying the principle of the cases referred to, we should not send the case down for a second trial in order that the damages which the jury ought to have assessed should be assessed to the appellant. We have no power to alter the verdict, and the result, therefore, is that upon this branch of the case the appellant fails."

I think the appeal should be dismissed.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

HUNTTING v. MACADAM.

Landlord and Tenant—Forfeiture of Lease—Relief agaainst Forfeiture — Non-payment of Rent Excused by Oral Assurance — Authority of Landlady's Husband — Grounds against Relief—Mental Incompetence—Knowledge of Tenant — Evidence — Option to Purchase—Restoration with Lease.

Appeal by defendant from judgment of HUNTER, C.J., 6 W. L. R. 501.

The appeal was heard by IRVING, MORRISON, and CLEMENT, JJ.

Sir Charles Hibbert Tupper, K.C., and E. P. Davis, K.C., for defendant.

Joseph Martin, K.C., for plaintiff.

IRVING, J.:—In my opinion, this appeal must be dismissed. With reference to the conclusions of fact arrived at by the learned Chief Justice, I am not prepared to differ

with him in any way. The plaintiff, therefore, had an equity to have the lease renewed: Hughes v. Metropolitan Co., 2 App. Cas. at p. 448.

The only question is, should the relief against the forfeiture of the option to purchase be granted under sec. 20 (7) of the Supreme Court Act? It seems to me that the right to purchase was part and parcel of the contract of the lease, and that the lease having been restored, on the ground that the defendant had given assurance that the rent would be accepted after its due date, the option to purchase would be restored.

MORRISON, J.:—The only point arising on this appeal is one of relief against a forfeiture arising from a breach of the covenant to pay rent under a lease wherein the plaintiff was lessee and the defendant lessor.

The plaintiff has a son, a married man, and the head of a lumber concern of some magnitude—presumably an experienced man of business. The defendant had at the time of the incidents involved herein a somewhat aged, infirm husband. The period during which the breach occurred was at the time of the late rather frenzied condition of the real estate market.

Neither the plaintiff's son nor the defendant's husband had any legal interest in the respective properties. However, the defendant alleges that she entered into the lease in question, the terms of which are said to be unconscionable, through the machinations and under the undue pressure of the plaintiff and her son, exercised upon her through her husband, with whom they also dealt, and for whose mental and physical condition she was in constant fear, which fear led her, so she asserts, finally, to sign the instrument in question.

The learned trial Judge has found on the facts against the defendant, and, notwithstanding the vigorous attempt of her counsel to get the Court away from those findings, I cannot see how that can be done in this particular case.

On this point I cannot do better than quote from the judgment of Farwell, L.J., in In re Wagstaff, 77 L. J. K. B. 192: "In fact, in my opinion, if it had not been that the Court of Appeal had always resolutely set its face against reversing findings of fact depending on the demeanour of witnesses, the burden and expense of calling witnesses and having them cross-examined in Court would have become intolerable by this time, if they were to be disregarded and

treated as mere paper evidence, which the Court of Appeal might deal with as though the Judge of first instance had never seen the witnesses at all. We are of course bound in a case like the present, where counsel, in their discretion and in the exercise of what they consider to be their duty, press upon us, to listen to the evidence; but, speaking for myself, I do so always with the mental reservation that the truth is far more likely to be ascertained when it depends on the credibility of A or B by the learned Judge in the Court below than it is by any of us sitting here."

He has found that transactions and negotiations, which ultimately crystallized into the lease, were as alleged by the plaintiff. He has found that there was duress. This involves even disbelieving the defendant, when she asserts that out of solicitude for her infirm husband (which in itself does not amount to duress) she consented to sign the lease. In short, he found that the plaintiff's absence and non-payment of rent upon the due date were quite in accordance with the arrangements and understanding come to between the parties.

He has found further that the position as between the parties has not so altered as to cause injustice, and that there are no intervening interests of third parties: Newbolt v. Bingham, 72 L. T. R. 852.

Prima facie the plaintiff is entitled to relief, and, as Courts in their inclination against forfeiture seize upon any positive act on the lessor's part from which an election to overlook the breach may be inferred, I think we must, in this case, in view of the trial Judge's findings, disregard the attempt of the defendant to meet the relief here upon equitable grounds, and refuse to accede to her desire to have the full legal effect of her covenant as to payment of rent.

I would dismiss the appeal with costs.

CLEMENT, J.:—Our Supreme Court Act, sec. 20 (7), clothes this Court with power "to relieve against all penalties and forfeitures," and the power carries with it, of course, the duty to exercise it in all proper cases. It is useless, perhaps, to protest against such paternal interference with men's bargains, but I must confess that to my mind it is, as put by Lord Eldon in Hill v. Barclay, 18 Ves. Jr. at p. 62, "taking a prodigious liberty with a contract" for any Court to say that the very result which the parties

have agreed should follow a specified act or omission shall not follow. I have not attempted to trace the provision in our Act to its source, if it had any other than our own legislature; but it certainly goes beyond any legislation in England or Ontario. The jurisdiction of the Court of Chancery in England to relieve a tenant against the forfeiture of his term for failure to pay his rent on the exact due date (though such forfeiture was expressly provided for in the lease) was too firmly settled in Lord Eldon's time to be disturbed, though, as he says, settled upon a principle "utterly without foundation." His vigorous protest had, however, this effect, that from that time forward the Courts in England have steadily denied their jurisdiction to interfere in the case of forfeitures arising from breaches other than the mere non-payment of rent: Barrow v. Isaacs, [1891] 1 Q. B. at p. 425. It required legislation to enable the Court to afford a tenant relief from, e.g., forfeiture for breach of a covenant to insure; and later legislation has conferred jurisdiction in certain other cases. In cases not covered by legislation relief can be extended, in England, only on the ground of subsequently intervening equities, as well set forth by Mr. Justice Duff in Morton v. Nichols, 12 B. C. R. at p. 488. It is proper to note, too, in this connection, that in the matter of relief against forfeiture for non-payment of rent legislation in England was along the line of regulation and curtailment rather than of extension of the jurisdiction assumed by the Court of Chancery.

However, it is not necessary, nor would it be proper, to attempt here any forecast as to how far our legislature's radical extension of this Court's jurisdiction will carry us, or any general statement of the principles on which the Court should act. For, as already indicated, this much is clear, that forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a court of equity should afford relief. That is the case we have before us; and the very principle upon which we must relieve against the forfeiture so far as concerns the tenant-right (to use Mr. Justice Osler's expression in Coventry v. McLean, 21 A. R. at p. 181), compels us to relieve against the forfeiture so far as the option to purchase is concerned. The sponge must be passed over the slate, and, upon the terms imposed by the Court being complied with, whatever (if any) they may be, the cause of

offence is as if it had never been. Our statute was not specifically referred to on the argument before us, but it was contended—and the contention had some shew of support in the language of the English Act regulating, as intimated above, the exercise of jurisdiction in these cases—that no relief can be afforded when once the forfeiture has, as it were, become perfected by the landlord's entry into possession. But in Howard v. Fanshaw, 64 L. J. Ch. 666, this contention was overruled, in my opinion properly, even under the English Acts. I do not see how the contention can be urged even plausibly under our statute. To give effect to it would rob the enactment of much of its remedial character and reduce the Court's jurisdiction to a merely quia timet basis. There is no hint of this in the very wide language of the Act.

Sir Charles Tupper, however, contends that the plaintiff in this case can stand in no better position than a plaintiff seeking specific performance, and that the lease in question here was obtained under such circumstances and is of such a character that the Court should not decree specific performance of it. It is alleged, firstly, that the lease was obtained by duress; that the plaintiff, or her son for her, contrived to arrange the terms of the lease with the late husband of the defendant, knowing that he was, through disease, of enfeebled intellect, and knowing, moreover, that, if he once agreed to the terms, his wife, the defendant, would be compelled either to agree or run the risk of killing her husband by an attitude of opposition to his wishes. This very serious charge the learned Chief Justice, after a patient hearing, has held to be unfounded, and I cannot see my way to express any doubt as to the correctness of his finding.

Then, secondly, it is said that the terms of the lease were unconscionable; that the option clause, particularly, was so unreasonable as to be in itself proof of overreaching. It is difficult in such a case as this, where a very marked and large rise in values has taken place within the past two or three years in Vancouver, to avoid being "wise after the event;" but on a careful perusal of the evidence I am not prepared to say that the figure named in the option was one at which no ordinarily intelligent man would be willing to sell this property in December, 1905.

These grounds of defence—to some extent they are really one—must therefore fail, and I am unable to see on this record and this evidence any other ground for refusing the plaintiff the relief she asks.

The appeal should be dismissed with costs.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

REX v. SCHERF.

Criminal Law—Rape—Verdict of Guilty—Judge's Charge—Exclusion of Verdict of Guilty of Minor Offence—Practical Exclusion of any Verdict but Guilty of Rape—Misdirection—New Trial.

Crown case reserved upon the indictment and conviction of defendant for rape.

The case was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

Joseph Martin, K.C., for the prisoner.

H. A. Maclean, K.C., for the Crown.

HUNTER, C.J.:—Indictment for rape with a verdict of guilty.

Among other objections to the learned Judge's charge which this Court has been requested to pass on are the following:—

9. When the jury came in and asked if they were limited to a verdict of "guilty" or "not guilty," the learned Judge erred in not informing them that they could bring in a verdict of indecent assault or common assault, or of an attempt to commit rape.

10. When the jury asked if any other verdict could have been brought in if she (the prosecutrix) consented, the learned Judge should have stated the different verdicts possible under the indictment.

11. When the jury asked if they could bring in assault or indecent assault, the learned Judge should have said "yes."

The learned Judge was asked by the foreman whether the jury were limited to a verdict of "guilty" or "not guilty," and, in effect, he withdrew from their consideration any other alternative. Hence is raised the bald question, whether or not the Judge can, because, in his opinion, there should be either a verdict of guilty of the gravest offence charged in the indictment, or an acquittal, withdraw from the jury the consideration of any other verdict which may be open on the indictment?

The question has already been passed on by this Court in the case of an indictment for murder, and resolved in the negative: Rex v. Wong On, 10 B. C. R. 555. It also came up in the case of Rex v. Sam Lock, not reported, also an indictment for murder. But, as there was plainly evidence on the record on which the jury might have found manslaughter, a new trial was ordered, the Judge having withdrawn manslaughter from the jury's consideration, and it was not necessary to decide the neat question.

For my part, I adhere to what was said in Rex v. Wong On, and am prepared to lay down the proposition without qualification that it is not competent to the Judge, if he allows the case to go to the jury on the graver offence, to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. I think it is the duty of the Judge to explain to the jury their legal powers; to point out to them all the possible findings open to them, no matter whether or not, in his opinion, it would be improper, illogical, or grotesque for the jury to bring in any intermediate verdict. There is no middle course possible, unless we are prepared to allow the Judge to step into the jury box, which would eventually jeopardize the independence of the tribunal to which alone our law has for centuries committed the duty of passing upon the issue between the Sovereign and the prisoner at the Bar. The Judge is to inform and assist and not dragoon or shepherd the jury. If he may withdraw the power to find a minor offence, I see no reason why he may not with draw the power to acquit. That the jury may legally find the minor offence—whatever may be the propriety of such a verdict—is clear from the fact that there is no means known to the law whereby either the Crown or the prisoner may have it set aside on the ground that they should have found the major offence. It may be that, in the opinion of the Court, they should have found the major offence,

but how can it be said that the finding of a lesser offence, included in the graver offence, is legally wrong? Again, the jury are sworn to find their verdict according to the evidence, not according to the views of the Judge. What does the evidence consist of? Not merely the words that fall from the lips of the witnesses, but their demeanour, the demeanour of the prisoner, and, generally speaking, the whole atmosphere of the trial. Suppose the case of a servant accused of murdering her mistress. A fellow servant testifies to the screams. The Judge is busy taking notes and does not catch the note of eagerness on the part of the witness to accentuate every circumstance that may be against the prisoner and glaze over anything that might be in her favour. But suppose the jury does so, and, observing the demeanour of the prisoner—especially if there is a view—and knowing that she has had a clear record before this occasion, come to the conclusion that there must have been sudden and extreme provocation, such as a charge of unchastity, to impel her to commit the act, can any one say that the jury would be wrong in finding manslaughter, and yet there would not be a shred of evidence in support of such a verdict in the transcript of the proceedings, which alone would be before the court of appeal. How, then, is it possible for the court of appeal to be possessed of all the evidence either for or against the prisoner? And how, then, is it possible for it to say, with certainty, that the finding of the lesser, as opposed to the major, offence, was wrong?

The fallacy of the whole argument in support of a court of appeal confirming or condoning the withdrawal by the trial Judge from the jury of the consideration of an intermediate verdict, lies, then, in the fact that in the nature of things the court of appeal can never have before it the evidence as it appeared at the trial.

Mr. Maclean laid much stress on the case of The People v. Barry, 27 Pac. Repr. 62, as an example of a case in which it would be ridiculous to instruct the jury that they might return an intermediate verdict. The case was that the defendant was charged with assault with intent to rob, the evidence being that he and two others assaulted the complainant, the other two taking the money. His defence was that he saw the other two attacking the complainant, and was helping him when the constable came up. A request by his counsel to the Judge to charge the jury that they

might find common assault was refused, and confirmed on appeal, on the ground that the evidence shewed that he was either guilty of assault with intent to rob or of no offence at all. But, as the charge of assault with intent to rob ex necessitate includes assault, a verdict to the latter effect would not have been legally wrong, and was therefore plainly within the power of the jury to render. Moreover, for anything the case shewed, the prisoner may have participated in the attack without the motive of robbery, or may have been unaware that such was the other's intention. Or, as he was accused at the same time of having had two convictions for larceny against him, that may have moved him to set up a false defence. But the fact that the prisoner sets up a false defence—which may be done under evil advice or from the fear that he is not going to have an unprejudiced trial, especially if he is a foreigner—while it may entail the penalties of perjury, does not debar him from his legal right to have all aspects of the case passed on by the jury.

Take the Sam Lock case again. There the prisoner, a Chinaman, swore that he killed the deceased in self-defence. The jury did not believe this defence, and the trial Judge put the matter as if the issue were murder or self-defence, so that the prisoner was convicted of murder. As a matter of fact there was no eye-witness, but there was an ear-witness, who heard the quarrelling and scuffling, and the prisoner had a record for being law-abiding and peaceable for over 40 years. It was, therefore, clearly open to the jury under a proper charge to find provocation so as to reduce the charge to manslaughter, but both the Crown and the Judge treated the issue as being that put forward by the prisoner, namely, murder or self-defence, the Chinaman evidently preferring to take his chance of a capital sentence rather than go to the penitentiary. But, in my opinion, the Crown and the accused cannot, either with or without the sanction of the Judge, enter into an undertaking, silent or express, that the trial is a duel to be conducted on the footing that the issue is to be either liberty or death, and it is the duty of the Crown, not less than that of the Judge himself, to see to it that all intermediate verdicts are considered by the jury, because the Crown, as representing all the King's subjects, including the prisoner himself, has, or ought to have, a sleepless interest in securing the true and proper verdict, regardless of the pri-

soner's perjury and of his desire to stake his life against his liberty.

Mr. Maclean urged that it would be ridiculous in many cases for the Judge to categorically go through all the possible minor verdicts open to the jury, but I see nothing ridiculous in fully informing the jury of their powers in respect of an issue which involves the life or liberty of the subject. Of course, while the Judge should do this, there is nothing to prevent him from pointing out to the jury as forcibly as he thinks fit that the propriety of one or more such verdicts, as the case may be, would be open to question, so long as he does not go to the length of shutting out from their consideration any one of them.

Mr. Maclean, however, mainly relied upon Sparf v. United States, 156 U. S. 51, and Rex v. Gilbert, 38 S. C. R. 284. As far as concerns the former, I much prefer the reasoning contained in the very instructive judgment of Mr. Justice Gray Cottar to the majority opinion; and as to the latter, I cannot accept it as authority for the proposition that the Judge may deny the jury their power to consider an intermediate verdict, especially as Mr. Justice Duff was a party to the decision in Rex v. Wong On. I take it that the Supreme Court did not consider that the trial Judge had gone to the length of directing the jury that they could not legally return manslaughter, but that he said that, so far as he could see, such a verdict could not be returned on the evidence. Personally, I should have thought it was open to very grave doubt whether he did not go too far, and would therefore have resolved the doubt in favour of the accused and sent the case to another jury.

However that may be, in the present case the jury several times requested to be informed whether any other alternative than that of guilty or not guilty was open to them, the only reply being a strong expression of the learned Judge's opinion that there was only one verdict which was warranted by the evidence; and therefore I think the learned Judge, moved no doubt by the distressing circumstances of the case, encroached on the function of the jury by withdrawing from them their power to find a lesser offence. If he could legally do this, then I see nothing to prevent it eventually coming to pass that the jury in a criminal trial would be a mere machine to register the opinions of the Judge, and the much vaunted bulwark of liberty would become a mere shadow and a name.

CLEMENT, J.:—I agree that there should be a new trial, on the ground that the charge of the learned trial Judge was calculated to lead the jury to believe that if they failed to find the accused guilty of rape, they would fall short of their plain duty. I do not think a Judge is entitled to press a jury that far. The evidence points strongly to an offence under sec. 211 of the Code. No intimation of this was given the jury, and I believe that if they had known that a verdict of not guilty on the charge of rape would not necessarily mean that the accused would go unwhipt of justice, their action on this indictment might have been different.

I am not prepared without further consideration to go to the length to which the learned Chief Justice has gone in his judgment just delivered. It seems to me that Rex v. Gilbert stands in the way. However, I do not find it necessary to come to a definite conclusion on that point.

IRVING, J., agreed that there should be a new trial.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

FOSS v. HILL.

Practice — Summons for Directions — Order XXX.— Venue Fixed by Order Giving Directions—Subsequent Application to Change Venue—Power of Judge to Vary Previous Order.

Appeal by defendant from an order of MORRISON, J., in Chambers refusing a motion by the defendant to change the venue from New Westminster to Fernie, upon the ground that by a previous order, made on a summons for directions, the venue had been fixed at Westminster, and that there was no power to review or vary the previous order.

The appeal was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

E. P. Davis, K.C., for defendant.

Joseph Martin, K.C., for plaintiffs.

HUNTER, C.J.:—On the question of practice, especially as the question is res nova in the full Court, I think the order made on a summons for directions has not the finality which usually attaches to orders made by the Court or a Judge, but is an interlocutory direction which may be changed, if the ends of justice require, by the same or any other Judge.

The title of Order XXX. itself indicates that what the Judge does is not to make an order in the ordinary sense, but to give directions, and the directions are given in respect of matters as to which the solicitor may not be in full possession of the facts when the summons is heard, as it may be taken out at any time, and which are mere matters of procedure, and which do not touch the rights of the parties. The design of Order XXX., in short, is to provide a more elastic and at the same time less expensive procedure in respect of the matters within its scope than the former system of distinct applications and orders, and I think we should be frustrating its object if we were to hold that a direction given under this Order has the same finality as an ordinary order. Even under the old practice the Court did not feel itself hampered from changing a purely procedure order whenever the ends of justice required. In Prestney v. Corporation of Colchester, 24 Ch. D. 377, it was held that a Judge could change an order for production of documents, which had been made by another Judge, from one place to another. Cotton, L.J., says at pp. 384-5: "In my opinion, the Judge must have a right in dealing with such a question, and in dealing with what has been directed by a previous interlocutory order, when new facts are brought before him to shew that following the precise directions of that interlocutory order will cause what he considers unnecessary inconvenience, or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted of carrying into effect the substance of the previous order. It would be very different if this were an interlocutory order in which the rights of the parties had been decided; then it is a case for appeal, and appeal only, and it must be prosecuted in the ordinary way. Here, where it is merely directing the mode in which the plaintiffs are

to avail themselves of the right of inspection, in my opinion the Judge has a perfect right, and it is his duty, on new facts being brought before him which may render it necessary to do so for the purpose of the due administration of justice, to make a new order, varying the form and giving a new direction as to the mode in which production shall be made. I have known it done frequently in my practice at the Bar."

It will be observed that he says "new facts." This does not mean that new facts must have come into existence since the former order was made, but that they may be facts which were not brought to the attention of the Judge who made the order, as the case was that there were a large number of documents which it would be at once oppressive and risky to bring to the place originally named, but the fact had not been brought to the first Judge's notice. Like instances in our own Court under the former practice will be found referred to in the case of Alaska Packers Association v. Spencer, 11 B. C. R. at p. 284.

Whether in the particular case, after a solicitor has allowed a direction to be made without objection, it should be changed, depends altogether on the circumstances. Here it is sworn and not contradicted that unless the venue is changed the defendant will be put to extra costs amounting to upwards of $1,000, while the plaintiffs do not shew that the change will prejudice them, and it is also sworn that a view of the locus in quo distant a few miles from the proposed place of trial would be expedient. There is no countervailing material filed by the plaintiffs, but the case is merely one where they seek to keep the defendant at an undue disadvantage arising from the omission by the solicitor's agent to keep the question of the venue open until he had been properly instructed. If we were to refuse the relief asked, we should simply be putting a premium on dilatory proceedings in connection with this class of summons, and at the same time confessing ourselves unable to prevent a mere interim direction which does not touch the rights of the parties from working an obvious injustice.

In my opinion, the appeal should be allowed with costs here and below, and the venue changed to Fernie.

IRVING, J., agreed with the opinion of HUNTER, C.J.

CLEMENT, J. (dissenting):—In the Yearly Practice for 1908, at p. 326, it is stated as "a general rule that since the Judicature Act no Court, Judge, or Master has any power to rehear, review, alter, or vary any judgment after it is signed, or order after it is made and drawn up;" and the cases cited fully bear out this statement.

Several qualifications of this general rule are discussed, the only one pertinent here being that "in the case of interlocutory applications and matters of mere procedure a Judge or Master has power, in dealing with what has been directed by a previous interlocutory order, where new facts are brought before him, which shew that following the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted of carrying into effect the substance of the previous order."

In my opinion, the case before us does not fall within this exception; and it does not fall within the "slip Rule" (Order XXVIII., Rule 11), as it cannot be pretended that the provision in the earlier order that the trial should take place at New Westminster was a clerical mistake or an error arising from an accidental slip or omission.

But it is urged that under Order XXX. we have now a new form of judicial pronouncement, differing from a judgment, decree, or order, viz., a "direction," which is purely tentative and of no binding force as an adjudication. Since the decision of my brother Morrison the Yearly Practice for 1908 has come to hand, and for the first time the statement appears (p. 344) that in England this view is taken of directions given under Order XXX. I gather that the "directions" given in England under this Order are not embodied in any formal order, but are simply entered on what one may describe as a "cause list." But, however that may be, the learned authors of the Yearly Practice do not put the position higher than as expressed in the judgment of Cotton, L.J., in Prestney v. Corporation of Colchester, 24 Ch. D. at pp. 384-5. The effect of that judgment is correctly stated in the passage above cited from p. 327 of the Yearly Practice of 1908. There is no suggestion in the case before us of changed conditions or new facts, but simply that there was not an unintentional but a thoughtless agreement to the order as made. To open

the matter anew on this suggestion is, and I speak with all deference, to encourage slipshod methods.

I would dismiss the appeal.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

SCOTT v. McCARTER.

Solicitor — Negligence — Instructions to Proceed under Workmen's Compensation Act—Failure to Observe Requirements of Act—Action against Solicitor—Nonsuit because no Damage Shewn—Plaintiff Injured in Mine not Owned by his Employers—"Undertakers"—No Remedy Available—"Owners"—Burden of Proof

Motion by plaintiff to set aside a nonsuit in an action against a solicitor for negligence.

The motion was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

J. A. Macdonald, K.C., for plaintiff.

S. S. Taylor, K.C., for defendant.

HUNTER, C.J.:—This is an action against a solicitor, in which the plaintiff alleges that the defendant undertook, in his capacity as solicitor, on the plaintiff's behalf, to duly bring and prosecute proceedings under the Workmen's Compensation Act, 1902, against the proper parties, to recover damages for personal injuries caused to the plaintiff by an accident in the Broadview Mine.

The Act requires, amongst other things, that the employer is to get notice of the accident as soon as practicable, and that the claim for compensation shall be made within 6 months of the accident; and the plaintiff alleges that the solicitor failed to observe these requirements, and that he thereby lost his remedy.

It is not in dispute that the accident occurred while the plaintiff was in the employment of certain persons who were not the owners of the mine, but who were developing it under an option of purchase.

The question that naturally arises at the outset is: Did the plaintiff have a cause of action against any one within the Act? Section 8 of the Act provides that the Act "shall apply only to employment by the undertakers, as hereinafter defined, on, in, or about a railway, factory, mine," etc., and by the next sub-section it is declared that "'undertakers' in the case of a mine means the owners thereof."

The Imperial Act of 1897, of which our Act is almost a transcript, provides in the corresponding section that "undertaker" in the case of a mine means the owner thereof, within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be; and by secs. 75 and 41 of these Acts respectively it is declared that the "term 'owner' when used in relation to any mine means any person or body corporate who is the immediate proprietor or lessee or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mine;" and by the former section it is also provided that "any contractor for the working of any mine shall be subject to the Act in like manner as if he were an owner, but so as not to except the owner from any liability."

It is plain from these provisions that the word "owner" in the Imperial Compensation Act includes the operator, but the British Columbia Act in terms applies only to the owner, and there is nothing to indicate that the legislature meant to include operators; and it is a familiar principle that it is no part of the function of a Court to insert language into an Act of Parliament which is not to be found there, except perhaps to avoid an absurdity: see, e.g., Salomon v. Salomon & Co., [1897] A. C. at p. 34; and this must especially be the case where the statute creates new rights and remedies.

I am, therefore, unable to see that the plaintiff has lost anything by the alleged negligence, and it therefore becomes unnecessary to discuss the other points.

We must dismiss the motion, but there ought to be some remedy provided by the legislature by which a workman may be compensated for injuries sustained under such circumstances.

MORRISON, J., agreed with HUNTER. C.J.

IRVING J. (dissenting):—I am not prepared to agree that this action should not have been allowed to go to the jury.

By the statute a remedy is given where the employer is the "owner" of the claim, and it is said that because the plaintiff did not shew at the trial who the "owners" were, the action must be dismissed. It was not shewn that the men who were working the claim at the time of the accident were not owners within the meaning of the Act.

The word "owner" is an ambiguous word—per Parke, B., in Chauntler v. Robinson, 4 Ex. 163—and may, for aught we know, include the persons in whose employ the plaintiff was at the time of the accident.

The defendant's duty was to have ascertained the exact terms upon which those persons were working the claim. This he omitted to do. It is argued that to make this action sustainable it is incumbent on the plaintiff to do now what the defendant neglected to do, that is, obtain the evidence of the terms upon which the mine was being worked by Emmens and Bottoroff. In view of the defendant's letter of 10th July, 1907, to the plaintiff, "that you (Scott) have a perfectly good case against Emmens and Bottoroff," it was not necessary for the plaintiff to go further. That letter made a sufficient prima facie case. The onus was then on the defendant to explain what he meant by the statement that "he (Scott) had a good case against Emmens and Bottoroff."

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

BRYCE v. CANADIAN PACIFIC R. W. CO.

Ship—Collision — Overtaking Vessel—Cause of Collision—Signals—Look-out—Rules of Navigation—"Keep out of the Way"—"Narrow Channels"—"Safe and Practicable"—Usage or Custom of Vessels—Evidence—Credibility of Witness—Erasures and Interlineations in "Scrap Log"—Expert Evidence—Practice of Admiralty Court—Assessors.

Appeal by plaintiffs from judgment of MARTIN, J., 6 W. L. R. 53, 13 B. C. R. 97.

The appeal was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

Joseph Martin, K.C., and W. J. Bowser, K.C., for plaintiffs.

E. V. Bodwell, K.C., for defendants.

HUNTER, C.J.:—Shortly after 2 p.m. on 21st July, 1906, the "Princess Victoria," a steamship of 6,000 horse power and 21 knots, belonging to the defendants, left Vancouver on her regular triangular run to Victoria and Seattle. She took the nearest route to sea, i.e., between Burnaby Shoal and Brockton Point, and entering the south side of the Narrows, after overhauling a small launch, almost immediately collided with the tug "Chehalis," which sank, and some 9 persons were drowned. As the day was fine and clear, and as it cannot be disputed that the "Princess Victoria" was an overtaking vessel, within the meaning of the regulations, and was on the wrong side of the channel (it being admitted that the Narrows is a narrow channel), the onus is on the defendants to account for the occurrence. This they attempt to do by alleging that the "Chehalis" altered her course as the "Princess" approached, and that if she had not done so there would have been no collision.

In support of this allegation there was the evidence of the officers of the "Princess." Captain Griffin says that after he starboarded her helm to go around Brockton Point, he saw a motor launch, which according to First Officer Guns was behaving badly in her efforts to buck the tide, but owing to the course it was taking he could not go so far to port as he had intended, and had to steady up to prevent the "Princess" from running it down; in other words, he had to alter his course. This of course brought him nearer to the "Chehalis," which he had observed crossing the Narrows before he rounded the point, and he says he gave two blasts to notify her captain that he was going to pass him on his port side, and that when in the act of giving the second blast he noticed the "Chehalis" make a sudden change in her course, taking her across the bows of the "Princess." This statement conflicts with the entry in the scrap log (which was admittedly altered before the transfer to the ink log) and which stated as follows: "Seeing 'Chehalis' coming across our bows under a starboard helm making for the bight west of Brockton Point, blew two whistles and stopped engines."

He also admitted on cross-examination that he did not know, as the log states, that the "Chehalis" was under a starboard helm. It is therefore evident that the account of the occurrence in the log is not to be relied upon, and it is also significant that the log does not suggest that the "Chehalis" had altered either her course or her speed. He also says that at the time of the impact his engines had been put full speed astern, and that the speed had been reduced to 3 knots by water, which would make the "Princess" going 3 knots astern by land, the current being 6 knots; but it seems to me that this is quite impossible, having regard to the way in which the vessels collided and the angle of the collision. It must be obvious that if, when going astern by the land, there was a collision, there must have been plenty of time to have shot ahead clear of the "Chehalis" owing to the greatly superior speed of the "Victoria."

Captain Griffin's evidence is in the main supported by Hilliard the quartermaster, and Guns, first officer, acting as pilot. Sweet, a passenger on the "Victoria," says that he first noticed the "Victoria" running, as he thought, dangerously close to the direction taken by the launch, and that afterwards his attention was caught by the "Chehalis" coming across the bows of the "Princess," having changed the direction of her course as he first saw it, but he admits in cross-examination that the apparent change might have been an optical illusion if the "Princess" had altered her course, and it is virtually admitted that the latter did so, as she had to steady up and discontinue her course to port in order to avoid the launch. Grant, another passenger on the "Victoria," thought it was the tide that brought the "Chehalis" across her bows, but is evidently mistaken in thinking that the "Princess" did not change her course to avoid the launch. Vilas, another passenger, says he was "watching the course of the launch and wondering if it would get out of the way in time to save its own neck. Of course we were travelling along at the time a pretty fast clip." And he says, that, as he stood looking at the launch to see if it got any of the wash from the "Victoria," he heard the captain give two whistles and looked up and saw the "Chehalis" coming right under her bow. It will be noticed that none of these passengers say that they looked backwards at the track made by the "Victoria" as she was passing the launch to see if she had changed her

course, and it is notorious that the ordinary observer on a moving object is almost certain to be under an optical illusion as to the motions or course of any other object, if he confines his attention to the other object, as no doubt these persons did, being on the eve of a collision.

The only evidence that Captain House altered his helm, and the learned Judge finds that he did alter his helm, was that of Lind, as none of the officers of the "Victoria" could say that they saw House shift his helm; in fact, the quartermaster not only does not say so, but says that the "Chehalis" came across with the tide. But Lind clearly discredited himself by his free and easy swearing, as where, for example, he says he swore to the fact that he saw the person steering the "Chehalis" throw his wheel to the right, which immediately threw her to port, although it would have the contrary effect, because the attorneys agreed "that that statement of facts should prevail."

On the other hand, we have the evidence of Jones, the lighthouse keeper at Brockton Point, who says that he saw the launch about 400 yards west of the point and about 100 yards south of the "Chehalis;" and first saw the "Victoria" about 50 yards east of the Point, making the tug about 400 or 500 yards ahead of her. The "Victoria" was going full speed, and going closer to the "Chehalis," and he did not observe any change in her speed until she struck. This evidence, which was not broken down, is the evidence of a person on shore presumably indifferent between the parties, who had been watching these very waters for 17 years, and therefore far more capable of observing accurately what was going on than any passenger on either vessel.

Grove, the lighthouse keeper at Prospect Point, says he noticed that the "Victoria" seemed to be heading straight for the "Chehalis," and that as soon as the sound of the "Victoria's" whistle had reached him the collision had taken place, and judging by the wash of the "Victoria's" bow she was going very fast.

Discarding then the evidence of the passengers on both sides as of little or no value on the question of a change in the course of the "Chehalis," we have the evidence of the officers of the "Victoria" opposed by that of the officers of the "Chehalis," as both House and Dean deny that she altered her course, while both the lighthouse keepers distinctly swear that the "Victoria" seemed to them to be

going towards the "Chehalis" and not the "Chehalis" towards the "Victoria," and there is the further circumstance that no plausible reason was urged why the "Chehalis" should have made the extraordinary change in her course as alleged.

There is, therefore, in my opinion, no solid evidence to make good the onus on the "Victoria" to shew that House altered his helm so as to contribute to the collision, and if there was any alteration of the helm, it was done in the effort to avoid the collision; and if there was in the course of the "Chehalis," although not through the fault of the helmsman, then it was due to the tide, which was one of the possibilities which Captain Griffin should have taken into account when overtaking a vessel which was barely able to cope with the current. Even the learned Judge does not find that House altered his helm until after Griffin's signal, but, according to the evidence of Cotton, the passenger on the "Victoria," the two lighthouse keepers, Dean, the engineer, and the plaintiff Bryce, the signal was almost immediately followed by the collision; in fact, the latter says that he had not time to go and warn his wife, who was below; while House says that after hearing the signal he did not quite get his helm hard over when his vessel was struck.

In my opinion, the evidence clearly shews that Captain Griffin soon found himself in difficulties when he entered the wrong side of the Narrows, which there was no reason for doing (except possibly to make up time, as he was late), especially as, according to himself, his vessel was easy to handle, and he never saw a tide which had the least effect on her. On his port side he found a launch which was wobbling about in her efforts to get into the slack water, and on his starboard side he saw a small tug making across the Narrows, evidently to get the advantage of the slack water, which under the circumstances she had a right to do. He should have at once, if necessary, slowed down or stopped and proceeded to the proper side of the channel astern of the tug. The initial fault was in rounding Brockton Point at full speed. If he chose to take that route, he should have proceeded slowly with his vessel well in hand to anticipate any emergency; while, if he chose to go at full speed, then he should have gone to the east of Burnaby Shoal until he opened up the Narrows, and had a clear view of it as far as the entrance. But, even though he did round the Point at full speed, I think he could easily have

avoided the catastrophe by going over to the north side astern of the "Chehalis;" but the trouble was that in making up his mind to pass between the launch and the tug he miscalculated the combined retarding effect of the current and the steadying up of his ship to avoid the launch, and, in my opinion, the "Victoria" was solely to blame, having committed a breach of articles 22, 23, 24, and 25 of the regulations.

So far as concerns the suggestion that the "Chehalis" should have kept a look-out astern, and was in fault for not doing so, I think that it is altogether unsound. Article 24 is more peremptory in its terms than almost any other, and, in my opinion, its object was to assure those on the overtaken vessel that they need not concern themselves about the movements of the overtaking vessel, provided the former keeps its course and speed. It is obvious that if the leading vessel is to take into account the possibilities of miscalculation and error by the overtaking vessel and keep noticing her movements, it might by endeavouring to neutralize some supposed error precipitate the very result which it sought to avoid. The principle to be enforced is easy and simple and leaves no room for uncertainty, and it is that the rear vessel must keep out of the way of the one ahead.

With respect to the fault ascribed to Captain Griffin for having given only two blasts when he was about to go astern, I am not disposed to lay any stress on this, as the mischief had then been done, and it was of vastly more consequence at that moment to try to minimize the effect of his error than to trouble himself about the whistle.

I have not found it necessary to concern myself with the authorities, as, in my opinion, on the facts there was a plain breach of plain regulations on the part of the "Princess Victoria," and, as stated, the onus on her to make out that the "Chehalis" also violated the regulations and thereby contributed to the disaster, has not been discharged.

It was insisted during the argument that we ought not to set aside the findings of the learned trial Judge, concurred in as they were by the assessors. But in this case there was no question as to what was the proper manœuvre to make at any time, except possibly that the collision might have been avoided at the last moment if the "Princess" had thrown her helm hard over or put only one screw astern, in which case the assessors would be wrong. The

sole question is whether or not either or both vessels committed a breach of the regulations, and this is a question which the Court alone must decide regardless of the opinion of the assessors.

In my opinion, the appeal should be allowed with costs here and below, in favour of all the plaintiffs, but, as my brother Clement differs as to Howse, and my brother Irving thinks that the appeal should be dismissed as to all the plaintiffs, the appeal will be allowed as to all except Howse.

As counsel for the appellants stated that, in the event of the appeal being allowed, they would not bring any more evidence as to the amount of compensation that should be allowed, we think that it is proper for us to assess the damages at once, which we do as follows:—

To the plaintiff Bryce, suing for himself....	$10,000
To the plaintiff Bryce, suing as administrator of his wife, deceased	5,000
To be apportioned as follows:— $3,000 to himself, and $2,000 to the mother of his wife.	
To the plaintiff Benwell, for himself	1,000
For the loss of his son	3,000
To be apportioned as follows:— $1,500 for himself and $1,500 for his wife.	
To the plaintiff Dean	1,500
To the plaintiff Crawford for the loss of his son	4,000
To be apportioned as follows:— $2,000 for himself and $2,000 for his wife.	

As to the plaintiff Yamaguchi it was agreed that the question of compensation should stand to abide the result of the appeal, and this matter will be dealt with by a member of the Court at the convenience of the parties.

With regard to Howse, we have agreed to assess the damages at $2,000, in the event of another appellate tribunal coming to the conclusion that he is entitled to succeed to the full extent, and in the meantime the question of the application of the Admiralty rule, as well as his costs, is reserved.

CLEMENT, J.:—As to all the appellant-plaintiffs, other than Howse, this appeal must, in my opinion, be allowed.

Deferring consideration of Howse's case, but assuming for a moment that he was guilty of negligence causing the disaster, that negligence is not imputable to the other plaintiffs: "The Bernina," 57 L. J. Ad. 65; and as to them therefore the question still remains, was the officer in charge of the "Princess Victoria" guilty of negligence causing the collision? For there may be two causes—both proximate, both simultaneously operative—of the one event. Where one of those causes is the negligence of the party suing, he cannot recover; but where it is the negligence, not of the plaintiff, but of a third party, it cannot operate to screen the party sued, the inquiry then being, as I have indicated, was the defendant also guilty of negligence? When the negligence alleged in a collision case is disregard of a statutory regulation, the further question in Canadian cases is, as pointed out in "The Cuba," 26 S. C. R. at p. 661, "whether the non-observance of the rule did or did not in fact contribute to the collision."

Reference is there made to "The Margaret," 54 L. J. Ad. 18 (H. L.). In that case, which turned upon the Thames Navigation Rules, Lord Blackburn says: "In that case" —speaking of "The Khedive," 5 App. Cas. 876—"the rule was a rule by statute, and it was enacted positively that, if the rule was not obeyed, the breach of it should in itself be deemed to be blame. When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been in fact the cause of the accident to some *extent* (it does not matter how much), and that is matter *of* proof."

In that same case Lord Watson expresses his view thus: "But in the case of a rule like this, mere disobedience is not enough; it must be shewn that it constituted fault in this sense—that it was actively contributing to the collision. To express it otherwise, it must be shewn to have been one of the proximate causes of the collision."

Later on, he expresses the opinion that the vessel, disregarding one of the rules, must accept the onus of shewing that the neglect did not contribute to the collision; but that view does not appear to have been shared by the other noble Lords, and I do not burden the defendants with that onus here.

In the case before us, the "Princess Victoria" was, in my opinion, guilty of a most unjustifiable breach of art. 25 of

the Collision Regulations, and that breach was, I think, the larger inducing cause of the catastrophe.

Article 25 reads as follows: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

To suggest a possible practice to the contrary is but to suggest a practice of law-breaking. One can readily see that allowance might be plausibly claimed for small, low-powered craft going out through the Narrows against the tide; and naturally desirous of taking every advantage of slack water and back eddies. Such craft might possibly find protection in the plea that the starboard side of mid-channel was not to them "safe and practicable," but manifestly no such plea could be put forward by a vessel like the "Princess Victoria."

The learned trial Judge has held that the First Narrows, from Prospect Point to Brockton Point, must be deemed a "narrow channel" within the meaning of this article, and I entirely agree with this view. The learned Judge then animadverts very emphatically upon the action of Captain Howse in disregarding this regulation; but, in my opinion—and I say it with all deference—the fault of Captain Howse in that regard was venial when compared with the recklessness of the captain of the "Princess Victoria." The only reference I can find in the judgment under review to this art. 25, so far as it touches the "Princess Victoria," is at the foot of p. 104 (13 B. C. R.) and as to this the learned Judge says (p. 105): "It is enough to refer to what has already been said on the point"—meaning, evidently, to refer to the passage on p. 102 which deals with the position only after the "Princess" had rounded the point. She is exonerated from all blame thereafter, but no reference is made to her course up to that time. In the latest case upon this particular article—The "Kaiser Wilhelm der Grosse," 76 L. J. P. 97, 138—Sir Gorrell Barnes gives expression to a view which, if I may say so, must commend itself by its inherent reasonableness, and that is, that the rule ought to be taken as applicable, not only to the actual channel, but also to "so much of the water adjoining as was necessary for the navigation of the channel." The same view appears clearly put forward in The "Harvest," 55 L. J. Ad. 35, in appeal 11 P. D. 90. In this last case, it is true there was, in addition to the ordinary narrow channel rule, an express rule that vessels should be brought into the port at the mouth of the

Tyne to the north of mid-channel, i.e., the starboard side for entering ships, and should be taken out to the south, i.e., the starboard side also for ships bound out. Of this rule Butt, J., says: "My understanding of that rule is that a vessel about to enter the Tyne coming from the southward is not to cross the south side to the north side close up to the pier-heads. She is to get on a course that will take her up the river at some considerable distance outside the piers. The reason for such a regulation is obvious."

And in that case a cross course two or two-and-a-half cables, i.e., 1-5 or 1-4 of a mile, distant from the pier-head was held faulty. In the Court of Appeal this view was upheld and emphasized. See also The "John o' Scott," [1897] P. 64. If, as put by Butt, J., the reason is "obvious," good seamanship would dictate the course, apart from express regulation.

Applying the principle thus enunciated to the case before us, it seems clear that, as a matter of obedience to the regulations, as well as of regard for what should be the first care of a good seaman, namely, the safeguarding of life and property, a vessel entering the First Narrows from the east should not only enter at a point north of mid-channel, but should get on to a course that will take her down the Narrows at some considerable distance outside, i.e., to the eastward of the entrance. The fact here is that instead of taking the course she should have taken outside Burnaby Shoal, thus opening up her course down the Narrows, the "Princess Victoria" got at once, after leaving her dock, upon a course which took her into the First Narrows within a very short distance—70 to 75 yards the captain made it—from Brockton Point and away to the south of mid-channel, and found herself at once in trouble. She had deliberately entered the channel on the wrong side at full speed, and she continued on that wrong side to the end, unable to pull up in time to avoid collision. Under these circumstances, I am quite unable to differentiate this case from Thorogood v. Bryan, 18 L. J. C. P. 336. I mean of course, as that case should have been decided in the view of the House of Lords in The "Bernina," ubi supra. Thorogood was riding in a cab. His driver negligently set him down in the middle of the road instead of at the kerb. The defendant's coachman, driving at excessive speed, ran over and killed him. According to the House of Lords (eliminating any question of Thorogood's own personal negligence in getting out where he did) his

widow) should have recovered. I can see no difference in principle between the act of Thorogood's driver in negligently setting his fare down where he did in the way of a negligently advancing cab, and the act of Captain Howse in negligently placing his passengers and crew in the way of the negligently advancing "Princess Victoria." I am not here placing any stress upon the question of the speed of the "Princess Victoria," but upon the fact that, as the result of a gross disregard of a plain rule, she advanced upon the spot where the collision took place, and, like the driver of Bryan's cab, could not pull up in time to avert disaster. In my opinion, it is impossible to say otherwise than that one effective cause of that disaster was the negligence of the captain of the "Princess Victoria." See Englehart v. Farrant, [1897] 1 Q. B. 243. With all deference, I again point out that this aspect of the case is not really touched upon in the judgment under review.

Other breaches of the regulations were charged against the "Princess Victoria:" (a) that her speed was, under the circumstances, excessive; (b) that, if she gave a two-blast signal, she did not in fact do what that signal indicated, viz., direct her course to port; (c) that, instead, she reversed her engines and went full speed astern without giving the three-blast signal to indicate that manœuvre; (d) that she, an overtaking ship, failed to keep out of the way; (e) that, finally, she failed to slacken her speed as promptly as was necessary on approaching the "Chehalis." In view of the opinion that I have expressed—that there was throughout a clear and continuous breach of art. 25—it becomes unnecessary to say anything as to these other alleged transgressions other than this, that I am not satisfied that any one of them was a cause of the collision. I should, perhaps, except charges (a), (d), and (e), as, to some extent and in a sense, those charges are involved with the more comprehensive charge under art. 25. But, standing alone, that is to say, if the "Princess Victoria" had been properly where she was immediately after rounding Brockton Point, I could not say that the learned trial Judge was not justified on the evidence in finding that those charges were not substantiated, i.e., as effective causes of this disaster. I point out, however, in reference to charge (a) that in The "Kaiser Wilhelm der Grosse," ubi supra, Lord Alverston criticises rather strongly an attempt to cross the mouth of Cherbourg Harbour, a "narrow channel," at half speed—in that case 18 knots.

But I must express my dissent from the learned trial Judge's view of the meaning of the words "I am directing my course to port." The word "port" can manifestly have no reference to the port side of the other ship, as the signal would, if so construed, mean one manœuvre of the helm on the part of an overtaking ship and the very opposite in the case of a meeting ship. I think the signal must mean "I am under a starboard helm." See The "Kaiser Wilhelm der Grosse," ubi supra, in which Fletcher-Moulton, L.J., speaks of the one-blast signal as meaning "that she was acting under a port helm," and the two-blast signal is spoken of by both Lord Alverstone and Fletcher-Moulton, L.J., as indicating that the ship giving the signal was "starboarding." See also The "Aristocrat," 77 L. J. P. 57. Lord Alverstone's language in the earlier case, "that he should twice signal he was starboarding when he was not doing so was highly improper," would be very pertinent here if the "false signal" (as Lord Alverstone calls it later on in his judgment) had contributed to the collision.

As to the appellant Howse, the learned trial Judge has found upon very conflicting testimony that at a time when the "Chehalis" was under obligation to keep her course and speed Captain Howse altered her course by "at least 3 to 4 points from west to southward, thus bringing her across the bows of the 'Princess Victoria.'" Some of the evidence would, if believed, indicate that this movement was made "in the agony of collision," but other evidence points strongly in an opposite direction. The learned trial Judge believed that Captain Howse was "startled" when he heard the "Princess Victoria's" whistle, "and made a wrong movement of his wheel at a critical moment in the strong tide." But, as the learned Judge viewed the evidence, Captain Howse should not have been "startled." Had the "Chehalis" had any sort of a look-out, the approach of the "Princess Victoria" would have been reported or seen by Captain Howse himself, and "this deplorable collision would have been averted." I cannot, therefore, having due regard to the principles which should guide an appellate tribunal in reviewing a judgment as to matters of fact, say that the learned Judge was wrong in finding Captain Howse to blame, i.e., guilty of contributory negligence. The assessors associated with the trial Judge agreed with him that the "Chehalis" was negligently handled on her "diagonal course from the north to the south shore." That course meant a breach of art. 25.

Lord Alverstone is disposed to think that this article "lays down a rule which is to be obeyed, not merely by one vessel as regards another, but, so far as practicable, absolutely and in all circumstances:" The "Kaiser Wilhelm der Grosse," supra. Whether this be the true view, or whether the article is to be obeyed, primarily, in the interest and for the protection of ships travelling in the opposite direction on their own proper side (and there was no evidence of any such on this occasion), the manœuvre, when permissible, is a risky one, and should only be taken with great precaution; and the learned Judge has found, and Captain Howse indeed admits, that no precaution whatever was taken. I might add that what I have just said applies a fortiori to condemn the "Princess Victoria" for her breach of this article 25, for she, unlike the "Chehalis," could have no knowledge, until close to Brockton Point, of what shipping, inward bound or otherwise, there might be in the Narrows.

IRVING, J. (dissenting):—I think the conclusions reached by the learned trial Judge are correct, and that the appeal should be dismissed.

In my opinion, the rate of speed of the "Princess Victoria" was not excessive; the course selected by her gave the "Chehalis" ample sea room, had that vessel maintained her course; and, having regard to the circumstances of the tides, the starboard side being already occupied by the "Chehalis," the power of the "Princess Victoria," it would be unreasonable to have expected the "Princess Victoria" to have made a detour so as to enter the channel on the starboard side, or, having entered it on the port side, to have gone across under the stern of the "Chehalis." The accident was due to the "Chehalis" trying to cross the channel, and then taking a sudden sheer to port under the combined influence of helm and tide.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

SMITH v. LIVINGSTON.

Vendor and Purchaser—Contract for Sale of Land—Variation as to Terms—Written Memorandum—Construction—Specific Performance.

Appeal by defendant from the judgment at the trial in favour of plaintiff in an action to compel specific perform-

ance by defendant of a contract for the sale of land to the plaintiff.

The appeal was heard by HUNTER, C.J., IRVING, J., CLEMENT, J.

D. G. Macdonell and W. C. Brown, for defendant.

J. A. Russell, for plaintiff.

IRVING, J.:—This is a most bewildering case. As I understand it, the defendant sold to the plaintiff two lots, viz., 10 and 14, for $285 net, on terms, $100 cash, $85 in 6 months, balance $100 in 12 months, with interest at 7 per cent. per annum.

The plaintiff, having been able to sell lot 14 for $225, asked the vendor to give him or his nominee a conveyance of the lot. This was done after the following arrangement was entered into.

"This agreement made this 23rd day of February, 1906, in duplicate, between C. C. Smith of Vancouver, real estate broker, of the first part, and J. H. Livingston, of the same place, barrister, of the second part. Whereas the party of the first part agreed to buy lots 14 in block 44 and 10 in block 50, both in district 184, Vancouver, for the sum of $285, payable as follows, $100 cash on date of agreement and receipt, $85 in 6 months, and $100 in 12 months, interest at rate of 7 per cent. on balance unpaid principal. And whereas the party of the first part now wishes to sell lot 14. Now this agreement witnesseth that, in consideration of a reduction from total purchase price of both lots of $10 (and the right to re-sell them), the receipt of which $10 is hereby by the party of the first part acknowledged, the party of the first part agrees to make re-investment of the value of the said lots and return to the party of the second part a profit over the said value of $30, within 2 months, and half balance of any profit made on such re-investment above the amount of $50. In witness whereof is hereto affixed our hands and seals. Signed and sealed in the presence of John Drysdale at Vancouver, this 23rd February, 1906. J. H. Livingston."

As I understand this document, and I confess I am not quite sure that I do, the arrangement made was this: plaintiff was to take this offer of $225 for lot 14, and also sell lot 10, and out of the profits anticipated he was to give the defendant $30 within 2 months, and the plaintiff was also to

share in any profit over and above the sum of $50 which was to be the plaintiff's profit and reward. In consideration of this the defendant threw $10 off each lot.

The essence of this agreement was that defendant should execute to the plaintiff or his nominee a conveyance of lot 10, but this the defendant has refused to do, although the plaintiff has paid him $185.00 cash
and tendered 94.25

$279.25

I cannot see on what grounds the defendant hopes to escape. By reducing the purchase price $10 on each lot, the full consideration is $265, and, if a year's interest is added, the defendant is still overpaid.

The appeal should be dismissed with costs.

CLEMENT, J.:—This much is clear: that defendant agreed to sell to plaintiff two lots for $285; $100 being payable (and paid) in cash, and the balance in deferred payments with interest at 7 per cent.; that defendant afterwards agreed to reduce the price by $10, and that the provision as to deferred payments should not stand in the way of a resale by plaintiff.

In consideration of this subsequent agreement by
ant, plaintiff was to do something, but what it was I must confess I can't made out. Beyond a vague provision for reinvestment by the plaintiff "of the value of the said lots" —whatever that may mean—and a "return" to defendant of part of something in the nature of profit on the reinvestment, the whole thing is unintelligible jargon. Whatever plaintiff agreed to, it was in no sense a condition precedent to the carrying out of the agreement for sale of the two lots, but something to follow upon a resale of them by plaintiff. It cannot, therefore, affect plaintiff's right to specific performance.

The defendant's conduct prior to the issue of the writ was, I think, a repudiation of his agreement to sell the particular lot (10) in question here, and the plaintiff, therefore, was entitled to ask for a declaration of his right to specific performance, even if the time for payment of the balance had not yet arrived. I think it had, but it seems to me immaterial whether it had or had not, except perhaps on the question of the tender made by plaintiff in June, 1906, which question would amount now to one as to interest merely. At the date when the learned trial Judge gave judgment, the time

for payment had elapsed, even on defendant's own reading of the agreements; so that the direction in the judgment that the defendant should execute a conveyance was warranted, the plaintiff being evidently satisfied as to title. The judgment, however—inadvertently no doubt—omits to provide for payment to the defendant of the balance due him, and there should, therefore, be a variation to that extent. I think the plaintiff was entitled to pay up at any time, and that the tender was sufficient in amount, and, therefore, if the defendant is allowed to deduct $94.25 (the amount tendered) from the costs, justice will be done. With this variation the appeal should be dismissed with costs.

HUNTER, C.J., agreed with CLEMENT, J.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

FERRARA v. BLIGH.

Bailment—Agistment — Loss of Horse — Negligence — Liability of Bailee.

Appeal by plaintiff from the judgment at the trial dismissing the action, which was brought to recover the value of a horse belonging to the plaintiff which was taken by defendant to pasture, and which escaped from defendant's pasture, got into a ditch, and died.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

Stuart Livingston, for plaintiff.

D. G. Macdonell, for defendant.

MORRISON, J.:—The defendant is an agister, and took the plaintiff's horse to pasture. Through the pasture ran an open ditch, one of a system of ditches used in that municipality for drainage purposes. The only means of watering stock there was from those ditches. This particular pasture was fenced, and another fence was run along one side of the ditch in question up to a small bridge, whereby animals could

cross from the main pasture into a smaller adjoining one, in which the material taken when making the ditch was thrown along its bank, forming a low dyke. I gather from the evidence that this small pasture was not necessary for the agistment of the horses taken by the defendant. The plaintiff's horse went from the main pasture to the smaller one across the bridge, and, in some unknown manner, got into the ditch and died. I gather further from the evidence that horses were not watered, and could not safely be watered, from that side of the ditch, the place for watering being in the main pasture.

The defendant received the horse for agistment without any express contract. The duty upon him to take the horse was purely voluntary, and he accepted the responsibility and fixed his remuneration. Although, of course, an agister is not an insurer of the safety of animals intrusted to him, yet he is bound to take ordinary and reasonable care of them. It seems to me that the exercise of ordinary supervision on the defendant's part by continuing the fence by means of a gate across the bridge would have obviated the accident.

I think the appeal should be allowed with costs.

IRVING, J.:—I would allow the appeal.

HUNTER, C.J.:—I have not made up my mind, but, as the other members of the Court are prepared to allow the appeal, I see no use in delaying judgment.

BRITISH COLUMBIA.

APRIL 29TH, 1908.

FULL COURT.

GRAY v. DANIELS.

Easement—Prescription — Ditch — Statutory Authority — Crown — Statutory Easement — Maintenance of Ditch— Pleading—Amendment—Vendor and Purchaser.

Appeal by plaintiff from a judgment in favour of defendant on a point of law raised by the pleadings.

The action was brought for a declaration that an easement by prescription existed over land bought by the plaintiff from the defendant, and that plaintiff was, therefore, by virtue of a clause in the agreement of sale and purchase, entitled to cancel the agreement.

The judgment declared that no easement existed, and dismissed the action.

The appeal was heard by MARTIN, MORRISON, and CLEMENT, JJ.

H. B. Robertson, for plaintiff.

W. J. Taylor, K.C., for defendant.

CLEMENT, J..—This case comes before us for decision on a point of law raised by the statement of defence. The facts are set forth in most meagre fashion in the statement of claim, but, as eked out by the admission of counsel before us, they may be shortly stated. The action is brought for the cancellation of an agreement for the purchase of certain land. More than 20 years before the date of the agreement, the Crown, under statutory authority, laid out a highway along one boundary of the property, at the same time digging a ditch along the side of the road for drainage purposes. Owing doubtless to the contour of the ground, this ditch, at a point opposite the land in question, took a turn toward the property, and actually extended a short distance into it. It is not seriously contended that this was in excess of the powers given to the Crown by the statute to be quoted later. This condition of affairs still exists, with the result that in the rainy season the waters drained off the highway are discharged through the ditch on to the property in question.

The agreement for the sale of the land contains a clause empowering the vendee (the plaintiff) to cancel the agreement in case it should appear that "any easement existed or might be exercised by any other person, company, firm, body politic or corporate thereover;" and, obviously, the real question in the case is whether, on the facts above set forth, there is or is not such an easement. But the question and the only question raised on the pleadings is whether there does or does not exist an easement by prescription, a question, in my opinion, in no way arising on the facts stated. Prescription has nothing to do with the exercise of a statutory right. The question here would be exactly the same had the work been done 5 years ago instead of over 20. As put by Pollock, C. B., in National Manure Co. v. Donald, 28 L. J. Ex. at p. 187: "Time cannot repeal or alter an Act of Parliament, nor can prescription be set up to extend a statutable title." See also Kinloch v. Neville, 10 L. J. Ex. 248. Two ideas may

be said to be basic in the case of an easement by prescription, viz., acquiescence or consent on the part of the owner of the servient tenement, and the possibility of interruption by him of the enjoyment of the right: see Webb v. Bird, 10 C. B. N. S. 268, and Sturges v. Bridgam, 11 Ch. D. 852. Neither of these ideas can have place in connection with a statutory grant, where the right is exerciseable in invitum, and where no lawful interference with the enjoyment of the right is possible.

The judgment under review is, therefore, in my opinion, unimpeachable in so far as it declares against the existence of an easement by prescription. But it goes further, and declares that no easement exists, and on this declaration the action is dismissed. In this view I am unable to concur. In my opinion, there is here a clear statutory easement.

An easement may be created by statute: National Manure Co. v. Donald, ubi supra; Mason v. Shrewsbury, etc., R. W. Co., 40 L. J. Q. B. 293, per Cockburn, C.J., at p. 297; Innes, 6th ed., p. 2; Goddard, 5th ed., p. 186; and the only question therefore is: did the Crown's action in laying out the ditch in manner above described create an easement over the property in question? This, of course, depends on the language of the statute under which the work was done. As this statute—so far as here material—has remained unaltered since 1875, it will suffice to quote the section from the R.S.B. C. 1897 ch. 113, sec. 79: "It shall be lawful for the Chief Commissioner of Lands and Works, in his discretion, to make public highways, and to declare the same by notice in the British Columbia Gazette, setting forth the direction and extent of such highway, and by himself or his agents to enter and take possession of any private roads and any lands in the province, and the timber thereon, for the purpose of laying out public roads of any width not exceeding 66 feet, and to vary and alter any existing roads; also to enter and take any gravel, timber, stone, and other materials required for the construction of any bridge or road, and also to enter upon any land for the purpose of cutting any drains that the Chief Commissioner of Lands and Works may think necessary."

To my mind, the object of the last clause was to give to the Chief Commissioner the power necessary to keep public highways drained and so passable, to which end the statute in effect provides that waters collected upon the highway may be turned into drains cut upon private property. In my

opinion, the grant of the right to cut a drain carries with it, ex necessitate rei, the right to maintain the drain so cut; and, from the other point of view, it imposes upon the land-owner the obligation of non-interference. This statutory servitude has its necessary co-relative in the right of the Crown, and of the municipality, as owner or occupier of the highway, to continue to discharge water which may collect thereon into the drain on the property in question. This is, in my opinion, an easement within the definition in Gale, stated by Lord Herschell in Simpson v. Godmanchester, 65 L. J. Ch. at p. 157, to be a perfectly correct definition: "An easement, properly so called, may be defined to be a privilege without profit which the owner of one neighbouring tenement has of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own lands, for the advantage of the dominant owner."

As the judgment under appeal was right upon the only point presented in argument, or upon the pleadings, I think the appeal should be dismissed with costs. But, as there seems to have been a misconception by both parties as to the nature of the right existing on the facts as stated and admitted before us, I think the judgment should be varied so as to limit the declaration to a denial of the claim that an easement by prescription exists; that the clause dismissing the action should be struck out; and that the parties should have liberty to amend as they may be advised. If there are no material facts other than now appear, it would follow that the plaintiff is entitled to cancel the agreement.

MORRISON, J.—The question involved in this appeal is whether an easement is created under the following circumstances. A ditch was constructed by statutory authority draining a highway into and over private property, which property had been sold under an agreement containing a clause providing for its cancellation in the event of it being found that an easement existed or might be exercised thereover. Water from this municipal drain or ditch had been flowing on to and through the property in question for over 20 years, and it was contended on behalf of the plaintiff at the trial: and raised here, that an easement by prescription exists. The judgment appealed from holds that there is no easement existing, and the action was dismissed.

Mr. Taylor, for the respondent, contends that, in this case, owing to the statutory powers existing, the municipality were authorized to enter upon the lands in question in the manner complained of—thus precluding any ground for holding that there has been an easement by prescription. With this contention I agree, but I cannot go to the length of the judgment appealed from that there was no easement at all created. In my opinion, the statutory enactment cited, viz., sec. 79, ch. 113, R. S. B. C. 1897, and sec. 26, ch. 42, 1903-4, which legislation was carried on from 1884—ch. 16, sec. 62, and 1875, ch. 5, sec. 73—has created a statutory easement. The judgment, although right in so far as it holds that there is no easement by prescription, should, therefore, be so limited. It follows that it should be further varied by striking out the clause whereby the action is dismissed; and that there should be liberty to amend.

MARTIN, J.:—In addition to what appears in the pleadings, it was admitted on the argument and we were asked to deal with the matter on assumption that the ditch or drain in question collects water on the highway and discharges it some feet within the premises in question, after which the water is carried away by the natural slope of the ground. The respondent relies upon that provision in sec. 79, ch. 113, R. S. B. C. of the Land Act (originally the Land Act of 1875, ch. 5, sec. 73), which allows the Chief Commissioner of Lands and Works to enter upon any land for the purpose of cutting any drains that (he) may think necessary.

To avoid the consequences of this power and to bring the case within the principle of the authorities cited, viz., Webb v. Bird, 10 C. B. N. S. 268, and Sturges v. Bridgam, 11 Ch. D. 852, the appellant takes the position that the ditch or drain so cut as above said, is not a "drain" within the meaning of the section, because it is not continued through the property. During the argument I could not quite appreciate this suggested distinction, and, therefore, asked the learned counsel to restate it so that I might note his exact contention for future consideration. Since then I have again reviewed the matter, but am unable to reach the conclusion that the expression "cutting a drain" is not satisfied by what has been done here: it is in popular parlance a "drain," and it has been cut and it must be assumed that the Chief Commissioner of Lands and Works thought it necessary to do so.

The appeal must, in my opinion, be dismissed.

BRITISH COLUMBIA.

LAMPMAN, Co. C.J. MAY 1ST, 1908.

COUNTY COURT OF VICTORIA.

HUTCHISON v. JOHNSTON.

Sale of Goods—Specific Article—Knowledge of Purpose—Representation of Fitness—Warranty — Evidence — Repairs—Liability for Payment—Counterclaim—Breach of Warranty—Damages.

The plaintiffs were the Victoria agents for the sale of the Truscott gasoline engine, and they themselves manufactured a gasoline engine of their own design. They also built motor launches.

The defendants were partners in a timber-staking scheme, and for the purposes of their enterprise decided to buy a motor boat, and with this view the defendant Johnston, who had charge of the arrangements for the partnership, saw Mr. Dan Hutchison, of the plaintiff company, and told him that he wanted a motor boat to be used in timber-cruising anywhere between Victoria and Prince Rupert, and Hutchison told him that they had a boat partly built, and he took Johnston and shewed it to him, and they talked over what work was yet necessary to be done on the boat; Hutchison also shewed Johnston a 9 horse power Truscott engine, which he suggested putting in the boat, and after a few days the two defendants went and saw Hutchison and agreed to take the launch fitted with the Truscott engine at $900, and it was eventually delivered and paid for and taken by defendants to Lowe Inlet in the steamer "Venture." Shortly after her arrival there, the defendants had trouble with the engine and they wired to Victoria asking that a man from plaintiffs' shop be sent up to start the engine. Plaintiffs sent a man up, and for his services and for supplying a mast and some other articles not included in the price of $900, the plaintiffs brought the present action, claiming $149.06. The defendants said that the plaintiffs warranted the launch to be good and sufficient for the purpose for which she was intended, and that the plaintiffs in doing the work and supplying the things (with a few exceptions), the price of which they are

suing for, were only attempting to remedy defects, and so they (the defendants) were not chargeable with the expense, and they counterclaimed for $1,094.80 damages. The defendants contended that the launch leaked badly, and that the engine was unworkable, and, broadly speaking, these were the questions of fact to be decided.

W. H. Langley, for plaintiffs.

A. E. McPhillips, K.C., for defendants.

LAMPMAN, Co. C.J.:—The defendant Johnston says that Hutchison warranted the boat to him to be a good one, and in doing so used the word "warrant;" the defendant Warren says that while at the plaintiffs' yard, and after some conversation about the boat and what they wanted her for, he called Hutchison aside and told him that they depended on him, and that Hutchison, who knew that Warren was putting up the cash for the purchase, replied that they could, as the boat was a good one, and they would have no trouble with it. Hutchison denies that he gave Johnston any warranty, and he varies Warren's account of their conversation. I doubt if Hutchison ever used the word "warrant," but I think Warren's account is correct. It seems reasonable, and, as Hutchison now maintains that the boat was a good one, I see no reason why he would not have told Warren what he (Warren) says he did tell him. I think it was an express warranty: see Cave v. Coleman, 3 Man. & R. 2; and De Lassalle v. Guildford, [1901] 2 K. B. 215. But whether there was an express warranty or not is, I think, immaterial, as the law implies a warranty that the boat was reasonably fit for the purpose for which it was intended. The purpose for which it was intended was explained to Hutchison, whose firm built the hull and installed the engine, and there can be no doubt that defendants relied on Hutchison's skill and judgment. I think that sec. 19 of the Sale of Goods Act applies to the circumstances of this case, and that, therefore, there was a warranty that the boat was reasonably suitable for use in timber-cruising.

Mr. Langley's argument that there was no warranty is much the same as that referred to by Lord Macnaghten in Drummond v. Van Ingen, 12 App. Cas. at p. 299, where he says: "Your Lordships were warned that if the appeal should be dismissed the effect would be to hamper trade, and to cast on manufacturers a burden which has not been cast on

them hitherto. That is the stock argument in all these cases. . . . It has never yet availed to relieve manufacturers from the liability which they assume by inviting customers to rely on their skill, or to excuse persons from fulfilling their contracts according to the real intention and true meaning of the bargain."

The evidence was so conflicting as to whether the engine would work or not, and as to whether the launch leaked, that I decided to appoint an independent expert (Mr. A. W. Le Page of Vancouver) to examine the boat and test the engine, and his report satisfies me that the engine would work, and that the defendants' failure to make it work was because of their lack of skill. Johnston knew something about boats, and the Japanese who was to act as engineer was a tugboat captain, and yet they were both content to take their chances with a gasoline engine after only half an hour's instruction. Instead of running the engine themselves with the instructor watching them, they sat in the end of the launch and watched the instructor and then went up to Lowe Inlet and thought they could do the same as he did. Mr. Le Page finds several things in the engine to criticize, but still I think the engine was reasonably fit for its purpose, and that it was installed reasonably well.

On the question as to whether the launch leaked, I am of the opinion that the defendants succeed. On the trial trip she leaked so much that Johnston spoke about it to Robert Hutchison, who was in charge, and he said the boat was tight, and would be all right after she was in the water a while. Johnston and the Japanese captain say she leaked when she arrived at Lowe Inlet, and always continued to leak. On cross-examination it was attempted to shew that the leakage was only ordinary, but the Japanese put it in a convincing manner when he said he told Johnston that if he had to keep baling water so much he would not have time for his proper work. It may have leaked at the stern bearing, which was loose, because it had been attached with brass studs and iron nuts (instead of brass nuts), and the galvanic action had destroyed the nuts. Hutchison contended that there was no leakage because of the iron nuts, as there was packing inside. If the nuts were tight, the water could not get through to the packing, but the water here did get through, and it is likely that it got through the packing also.

Another place at which there was probably leakage was through the hole in the hull where the water pipe went through. In taking the engine out Mr. Le Page found that the water pipe was loose, and he says that would be likely to make the boat leak. Hutchison admits that they made a mistake for which he is unable to account in putting the iron nuts on the brass studs, and that bit of carelessness on the part of the plaintiffs is a factor in bringing me to the conclusion that the boat was always leaky, rather than to the conclusion that she was so strained after the trial trip as to make her leaky.

For the mast the plaintiffs are entitled to $15, and for grease, lubricant, and oil, to $8; the two cases of gasoline were used by defendant Johnston's brother, and I do not think the defendants are properly chargeable with their price; the charge for the name-boards is abandoned; they are entitled to $6.75 for dry cells; to $84 for the electrician's services, and $17 for his return passage from Lowe Inlet. I don't think the first steering gear, rope, etc., was strong enough, and nothing is allowed for the second one supplied. In all, the plaintiffs on their claim are entitled to $130.75.

As to the counterclaim. The defendants are entitled to the difference in value between that of the boat when delivered, and what it would have been worth had it fulfilled the warranty, and they are also entitled to damages caused by the unseaworthiness. In their particulars of items of damage the defendants have included wages paid the crew, wharfage, and several other items, for which I do not think the plaintiffs (the defendants to the counterclaim), are liable. These expenses were incurred by the defendants because of the failure of the boat to run; but the boat failed to run because of the defendants not understanding the engine rather than because of her unseaworthiness. Though the boat did leak badly, the defendants ran her at some inconvenience, it is true, but I am satisfied that had they understood the engine they could and would have gone on with their timber-cruising, and consequently I do not think they are entitled to any damages in respect of most of the items claimed. Provisions to the value of $40 were destroyed by water, and plaintiffs are liable for that amount. Defendants went to some expense in making some shelves, etc., which Johnston said plaintiffs agreed to supply, but the only items under this head in respect to which they are entitled to succeed are the

awning for the cockpit and a wooden boxing to cover the engine; $10 would cover these two items. In all I do not think defendants suffered damages for which plaintiffs are liable in excess of $150.

Mr. Langley argued that defendants failed to return the boat or to notify the plaintiffs of any defects, and hence they cannot now succeed, and he cites in support Milner v. Tucker, 1 C. & P. 15; Percival v. Blake, 2 C. & P. 514; Cash v. Giles, 3 C. & P. 407; and Chesterman v. Lamb, 2 A. & E. 129. These cases do not lay down any rule of law such as contended; the first three are rather judgments on facts; if a buyer makes no objection within a reasonable time to the quality of an article bought, there will be a strong presumption that the article really did answer the warranty, but in the case before me there can be no doubt that defendants were always dissatisfied; they complained to plaintiffs' man at Lowe Inlet, and while it would have been more businesslike had they made their complaint in writing, or gone to plaintiffs at once on their return to Victoria, still I do not see that their failure to do so affects the point in issue. In Chesterman v. Lamb, a tender of a horse which failed to answer a warranty back to the seller was only held necessary to enable the purchaser to recover for the keep of the horse; at least that is my idea of that decision.

On their claim the plaintiffs are entitled to $130.75, and on their counterclaim defendants are entitled to $150. For the difference $19.25 judgment will be entered in their favour. On the question of costs I would like to hear counsel before giving a decision.

ALBERTA.

BECK, J. MARCH 25TH, 1908.

TRIAL.

CARRUTHERS v. BEISIEGEL.

Malicious Prosecution—Absence of Reasonable and Probable Cause for Prosecution—Commencement and Continuation of Prosecution—Malice—Findings of Trial Judge—Damages—Costs—Scale of—District Court Jurisdiction—Set-off—Justice of the Peace—Issue of Warrant in Lieu of Summons.

Action for malicious prosecution, tried without a jury

A. A. Ballachey, High River, for plaintiff.

J. E. Varley, High River, for defendant.

BECK, J..—The charge laid by the defendant was one against the plaintiff and his son Arthur Carruthers. It charged that both the plaintiff and his son on 4th August, 1907, wilfully destroyed, by killing and maining, one yearling bull, the property of the defendant, contrary to the provisions of sec. 499, sub-sec. 6, of the Criminal Code.

The information was laid on 7th August. A warrant was issued, upon which the plaintiff was arrested and brought before the justice. The plaintiff was allowed to go, apparently on his own personal undertaking to appear on 3rd September. On that day evidence was given before the justice by defendant and his two sons, young boys of 11 and 13 years of age; and upon this evidence the plaintiff and his son Arthur were committed for trial. They were both afterwards acquitted upon a trial before a Judge of the Supreme Court. The fact is that it was the plaintiff's son Arthur who killed the animal. Both the father and the son, as well as the other witnesses, stated in evidence that the animal had gone into the plaintiff's son's enclosure, and that in attempting to drive it out it had charged upon the son, who was lame and suffering from rheumatism, and that he in self-defence drove a mower sickle, which immediately before he had been engaged in sharpening, into the animal's head. It appears that one of the defendant's sons was driving the bull, and that it ran away from him, and thus got into the plaintiff's son's enclosure, where it was killed as already stated. The defendant's son came up shortly afterwards and was told by the plaintiff to go and bring his father. The father arrived within an hour of the affair, and, coming up to the place where the animal was lying, close to which the plaintiff and his sons Arthur and Frank were standing, said either, "How did this happen?" or "What does this mean?" The plaintiff and his sons say the answer was, "The bull ran at Art, and Art struck it with a sickle and killed it." The defendant says the answer was, "We killed the bull," and that he inquired, "Who is we?" and that the plaintiff replied, "Arthur and I." One of the defendant's sons, who appears to have been within hearing distance, corroborates the defendant's version. In the defendant's depositions taken on his examination for discovery, besides this version, he gives

the following: "The question I put to Mr. Carruthers and the way he answered me I hadn't the least doubt but what he had a hand in it as much as his son, because I couldn't get him to say it was Arthur killed him. He said, 'It was we that killed the bull.' And I asked him, 'Who are we?' and he said, 'That is our business.'" I think, in view of the fact that it was Arthur Carruthers that actually killed the animal, the plaintiff's version is the more reasonable; and, in view of the discrepancy between the two versions given by the defendant, the more reliable. I have no doubt of the fact that it was Arthur Carruthers who actually killed the animal; there was no possibility of the evidence adduced by the plaintiff being contradicted; but it was in fact corroborated by the evidence of the defendant's son Arthur, who from a distance saw the bull struck by Arthur Carruthers with some instrument which glittered in the sun, and saw the bull fall. Arthur Beisiegel told his father on the day of the occurrence what he had seen.

The following day the defendant consulted a lawyer, giving the version which he gave at the trial of what had occurred at the conversation which took place where the bull was lying, but not telling him what his son Arthur had told him. The lawyer told him to return on the 7th. His two sons appear to have accompanied him on that day and to have been questioned by the lawyer, but what he ascertained from them or whether he questioned them before or after the information was laid does not appear. The lawyer drew the information, and the defendant swore to it on that day. On the following day the defendant was informed by one Keller that the plaintiff had told him how Arthur Carruthers had killed the bull, and gave the plaintiff's explanation. I infer that this was never told to the lawyer. I think the defendant acted on a mere suspicion against the plaintiff; that he ought to have hesitated in view of the statement of his son Arthur, and ought to have communicated that statement to the lawyer.

I am of opinion, too, that, had I found the plaintiff had failed to prove want of reasonable and probable cause previously to the laying of the information, the defendant would still be liable for the further maintenance of the prosecution, if, having (as I think he did through Keller) subsequently acquired information which was such as would leave him without reasonable and probable cause, he failed either to

withdraw the charge or at least to bring his subsequently acquired information to the notice of the tribunal seised of the charge.

This view seems to be implied in Weston v. Beeman, 27 L. J. Ex. 57, and to be supported by American authorities. It is laid down in 26 Cyc., tit, "Malicious Prosecution," p. 16, that "it is not material to plaintiff's right of recovery whether defendant wrongfully commenced or tortiously continued the original proceeding after want of probable cause had been shewn therein upon the charge presented."

I find that the plaintiff has proved that the defendant both laid and proceeded with the charge against the defendant without reasonable and probable cause.

I find, too, that the plaintiff has proved malice. Besides divers circumstances to which I need not refer, it was sworn to by the witness John Marth that on one occasion the defendant said, referring to the plaintiff and his sons, "I'll get even with them yet," and on another, referring to the killing of the bull, "I'll make it a damned dear butchering for them." The defendant denied the former, but questioned only the form of the latter statement.

The plaintiff estimated his actual financial loss (some portion at least I think was too remote), at $376.60; but it was made to appear that of this amount the greater part should be borne equally by his son Arthur, who is a married man farming on his own account. I assess the plaintiff's damages at $190.

I think the plaintiff ought, when commencing the action, to have felt that the amount of damages recoverable in the District Court, namely, $400, would be ample compensation, and, therefore, that the action ought to have been brought in that Court. I give the plaintiff costs on the District Court scale, but I see no reason for certifying so as to prevent the defendant setting off his costs of defence.

I take this occasion to make some observations which I hope may come to the notice of the justices of the peace of the province. When an information is laid before a justice, he should use some discretion and common sense in deciding whether he should issue a warrant or a summons to secure the attendance of the accused. In this case the justice issued a warrant. I think he acted quite improperly in doing so. The defendant and his two sons were occupying, under separate occupations though working together, 3 quarter-sections of land; between them they owned 18 teams of horses

and a corresponding quantity of farm implements; and had 200 acres of land under cultivation, though it is quite true that the land was government land, and that they had merely "squatted" on it. The value of the bull which was the subject of the charge was only $25. These facts were all within the knowledge of the complainant, and it may be presumed would have been stated in answer to the justice's inquiry. I think he ought to have inquired, and, had he received the information, concluded that a summons would have been effective to procure the accused's attendance. He seems to have issued a warrant as a matter of course, for it appears that on the accused being brought before him upon the warrant he was allowed to go merely on his personal undertaking to appear at the date set for the preliminary hearing.

ALBERTA.

BECK, J. MARCH 25TH, 1908.

TRIAL.

HIGH RIVER MEAT MARKET v. ROUTLEDGE.

Bankruptcy and Insolvency—Alberta Assignments Act — Transfer of Property by Insolvent to Creditor—Action to Set aside, Brought within Sixty Days—Presumption—Rebuttal—Absence of Intent to Defeat Creditors—Substance of Transaction — Rescission of Contract for Purchase made by Insolvent — Restoration to Vendor—Vendor's Lien not Waived by Acceptance of Promissory Note for Part of Purchase Money.

Action by creditors on behalf of themselves and all other creditors of the defendant Wetheral to set aside a transfer of property made by the defendant Wetheral, when insolvent, to the defendants Holmes and Routledge, as preferential and void under the Alberta Assignments Act.

J. E. Varley, High River, for plaintiffs.

W. L. Walsh, K.C., and A. A. Ballachey, High River, for defendants.

BECK, J.:—On 28th December, 1906, the defendant Routledge, being the owner of the Alberta Hotel, High River, and

its contents, subject to a mortgage to the Calgary Brewing and Malting Company and one Hatfield for $10,700, sold the same to the defendant Wetheral for $28,000 made up as follows:—

The mortgage	$10,700
Cash paid on sale	1,000
Note given on sale	2,000
Mortgage given on sale	14,300
	$28,000

Wetheral carried on the hotel business till the early part of September, 1907. On the 27th of that month Routledge repurchased the hotel and contents from Wetheral. The particulars of the transaction I will state in a moment.

Routledge discounted the $2,000 note with the defendants, the Union Bank of Canada. At the date of Routledge's re-purchase it had been reduced to $1,800, and was current as a note for that amount. By that date also Wetheral had made payments to Routledge amounting in round figures to $1,300, and had paid some portion of the interest on the Calgary Brewing Company and Hatfield mortgage.

Business generally in High River had fallen off. The value or rather the price of land had considerably depreciated. Wetheral had suffered in this respect like the rest of the population. It appears, too, that he had paid or rather agreed to pay an excessive price for the hotel. In the result in September, 1907, he was insolvent.

Conferences took place between Wetheral, Routledge, and some of Wetheral's creditors. A preliminary arrangement was made between Routledge and Wetheral, which was embodied in a memorandum dated 17th September and executed by Routledge only, whereby, " in consideration of the giving up of possession by Wetheral to Routledge of the Alberta Hotel and of the transfer of the same together with the license (which was in Wetheral's name), furniture, and stock-in-trade," Routledge covenanted to pay to Wetheral $2,700 as follows: $700 in 3 months; $1,000 in 4 months; and $1,000 in six months; and to assume and pay the note of $1,800 held by the Union Bank; and to execute a mortgage in favour of the defendant Holmes as a trustee for the total of the above sum, viz., $4,500; and further to pay and discharge a note of Wetheral's for $275 in favour of one Fraser;

and further to "conform to and abide by the verbal settlement arrived at in the office of Lougheed & Bennett at Calgary on the 16th September (this referred to a meeting at which Routledge, Wetheral, and a number of his creditors were present), and execute such documents," etc. Between the 17th and 25th September Routledge paid the item of $275, and on the 25th September a memorandum of agreement of that date was executed by Wetheral, Routledge, and Holmes, together with a land mortgage on the hotel property and a chattel mortgage on the contents, of even date with the agreement from Wetheral to Holmes for $4,500 payable as above indicated.

The agreement of the 25th September provided for the concurrent execution of the mortgages for $4,500, and, in addition, for the payment of the taxes and the municipality's bill for electric light.

It provided, also, for the conveyance of the hotel and contents to Routledge, subject to the mortgage of the Calgary Brewing Company and Hatfield.

Then it contained an assignment by Wetheral to Holmes of the $2,700, and authorized Routledge to execute the mortgage to Holmes, and directed Holmes to apply the $2,700 as follows:—

(1) To Lougheed & Bennett $55 for professional services rendered in connection with the hotel, together with the amount of their bill in connection with the settlement represented by the agreement.

(2) Certain amounts owing for wages which accrued while the hotel was occupied by Wetheral.

(3) The balance pro rata "among all the other creditors of Wetheral in accordance with the list of creditors hereunto attached and signed by Wetheral."

(4) To the Union Bank $1,800.

The schedule of creditors contained the names of the plaintiffs, and, with the other names mentioned in the agreement, comprised, as far as known at the time of the agreement and at the time of the trial, a complete list of Wetheral's creditors.

The creditors generally were not called to the meeting, and only a few of the more important were there represented.

Routledge appears to have been anxious to get immediate possession of the hotel, and, in that connection, an assign-

ment of the license, without the delay and expense of and probable loss consequent upon taking legal proceedings upon his mortgages.

Wetheral appears to have held out as against Routledge by way of insisting upon some of the provisions which were eventually embodied in the agreement. Wetheral says he agreed to what the creditors decided. The $2,700 was arrived at by taking the amount which Wetheral had paid to Routledge and to the mortgagees and the amount of the increase in value of the stock over the value when Wetheral bought from Routledge, and from the sum of these deducting a sum calculated by way of a charge against Wetheral for the rent of the hotel from 28th December, 1906, to 25th September, 1907, at the rate of $250 a month.

Wetheral, it appears, had nothing that was not disposed of by the agreement except his book debts, amounting to about $1,000, of which 35 or 40 per cent. was good. His liabilities amounted to approximately $8,000; his assets to the $4,500 represented by the agreement, and the book debts.

The plaintiffs attack the arrangement made by the agreement of 25th September, on the ground that it is void under the Assignments Act (ch. 6 of 1907, Alberta).

The action was commenced on 13th November, 1907, that is, within 60 days of the date of the agreement.

Wetheral was undoubtedly insolvent on 25th September, 1907, and Routledge certainly knew this, because he was aware of the contents of the agreement.

I find as a fact that the agreement of 25th September was not made with the intent on the part of either Routledge or Wetheral to defeat, hinder, delay, or prejudice Wetheral's creditors, and I have come to the conclusion and hold that the agreement is not void under the Act.

In determining whether a transaction is affected by the provisions of the Assignments Act, I think the substance—the substantial effect—rather than the mere form of the transaction should be looked at.

Had Routledge in selling to Wetheral given him an agreement for sale, instead of giving a transfer and bill of sale and taking mortgages back, no one could doubt the right of the parties to agree to a rescission of the agreement on the terms they actually agreed to.

All parties acting bona fide, as I find they did, I think they could take the same course, although the transaction had taken the form of a conveyance with a mortgage back.

Routledge in effect said to Wetheral: "You evidently cannot pay me for the property; you are getting day by day into a worse financial position; we shall both lose seriously if you force me to take legal proceedings to get title and possession; assign me the license, give me a conveyance back and immediate possession, so that I may take over the business as a going concern; if you will do this, I will give you back what you put into the business, less a reasonable charge against you by way of rent; the $1,800 note is part of the purchase price, so that it follows I have to take that up; in this way we shall each be restored as nearly as possible to our respective positions before I sold the property to you." This was, in effect, the proposal to which Wetheral agreed. I am convinced by the evidence that if some such arrangement had not been made, but Routledge had been forced to take legal proceedings, not only would he have suffered a serious loss, but there would have been no fund whatever for the unsecured creditors; in other words, I am satisfied that the result of the arrangement was to create the fund of $2,700 which otherwise would have been non-existent.

Looking, therefore, at the transaction broadly, and having regard to its substance and effect, I hold that it is valid.

It was assumed throughout the case that no security existed for the $1,800 note. I am, however, strongly inclined to the opinion that Routledge never lost his vendor's lien for that portion of the purchase price.

A vendor's lien may persist though the vendor have no positive intention that it should. The presumption is in favour of its existence. The onus of shewing that it has been waived or discharged is upon those who so assert. The text-books seem to assume that where a mortgage is taken for a part of the purchase money and a note for the rest, the lien is waived as to the amount of the note (see Dart on Vendor and Purchaser, 7th ed., p. 734), and for this the authority is Bond v. Kent, 2 Vern. 281, 23 R. R. 281, decided in the year 1692. This case seems to have been followed in apparently an oral judgment by Strong, V.-C., in Anderson v. Trott, 19 Gr. 619.

In the leading case of Mackreth v. Symmons, 15 Ves. Jr. 345, 33 R. R. 329, it is said: "The next case is Bond

v. Kent, 2 Vern. 281; the circumstances of which are special; a mortgage for part of the money, and a note for the residue. It was urged with considerable, perhaps not inclusive (sic) weight, that the express charge of a part gave ground for the inference that a lien for the residue was not intended."

As I have said, it is not necessary to the existence and persistence of a vendor's lien that there should be intention to that effect; it comes into existence and continues unless there is an intention on the part of the vendor to the contrary. Bond v. Kent is authority only for the proposition that the taking of a note for part of the purchase money, the rest being secured by a mortgage, is a circumstance from which the inference of fact may be drawn that it was the intention of the vendor that there should be no lien.

The conditions and methods of business in England in the 17th century were widely different from those in Canada in the 20th, and it by no means follows that the same inferences should be drawn now as then from the same facts.

The inference I draw is that there was no reason, as in some cases there might be, why the land should not be mortgaged for the whole unpaid portion of the purchase money, but I think that both parties looked upon the $1,000 paid in cash and the $2,000 produced by the discounting of the note as making a cash payment of $3,000, and that neither then doubted (business being then very good) that the note would be met either wholly or partly at maturity, but at all events eventually. On this inference of fact I am of opinion that the lien in favour of Routledge for the balance of the $2,000 was not waived. If I am right, no case of preference can arise.

The plaintiff's action will be dismissed with costs.

On the question of vendor's lien see Story's Eq. Jur., 2nd Eng. ed., sec. 1223 et seq.; Dart, 7th ed., p. 729 et seq.; Pomeroy's Eq. Jur., tit. "Vendor's Lien on Conveyance," sec. 12 et seq.; Collins v. Collins, 31 Beav. 346; Davis v. Thomas, [1900] 2 Ch. 468.

ALBERTA.

SCOTT, J. MAY 7TH, 1908.

CHAMBERS.

GRAVES v. MASON.

Summary Judgment—Rule 103—Action for Instalment of Purchase Money of Land and Interest—Defence—Want of Title in Plaintiffs — Equitable Relief — Doubt as to Claim for Interest—Unconditional Leave to Defend.

Motion by plaintiff for summary judgment under Rule 103.

O. M. Biggar, for plaintiff.

H. H. Hyndman, for defendants.

SCOTT, J.:—Plaintiff's claim is for $4,000, amount of an instalment of purchase money due 1st March, 1908, under an agreement for sale of certain lands sold by them to the defendants, and for interest up to that date on the balance of the purchase money.

By the terms of the agreement, the last instalment of the purchase money falls due on 1st November, 1909, upon payment of which the defendants will become entitled to a conveyance of the property.

It is shewn that the plaintiffs are not the owners of the property. It is not shewn that they have the right to acquire the title at the time they may be called upon to convey to the defendants. What is shewn, however, is, that the present owner, one Grierson, is at the present time ready and willing to convey to the defendants upon payment of the purchase money due by them.

The defendants, by their statement of defence, have raised the question of the absence of title in the plaintiffs, and I cannot satisfy myself that they are not entitled to some equitable relief by reason thereof. In Ontario it appears to be well settled that they would be. This is shewn by the judgment in Armstrong v. Auger, 21 O. R. 98, and the cases there referred to. A recent judgment of the Court of Appeal for Ontario, Vivian v. Clergue, 11 O. W. R. 1014, might at first sight be deemed to hold to the contrary, but in that case the question of the absence of title in the plaintiffs was not raised.

It also appears to me to be doubtful whether, under the terms of the agreement, the plaintiffs are entitled to recover interest on the whole balance of the purchase money or anything beyond that which has accrued upon the instalment sued for.

Application refused. Costs to be costs in the cause to defendants in any event on final taxation.

YUKON TERRITORY.

CRAIG. J. MAY 5TH, 1908.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. WILSON.

Discovery—Production of Documents—Inspection—Privilege—Mortgage—Books of Bank—Bank Act — Fraud—Preliminary Issue—Appointment of Accountant as Agent to Inspect Books—Grounds for.

Motion by defendants for an order allowing the defendants to inspect the documents disclosed in the affidavit on production of the plaintiffs the Canadian Bank of Commerce, and permitting an expert accountant to act as agent for defendants in the inspection of the bank's books.

The action was brought by the bank and Donald A. Cameron, plaintiffs, against Thomas G. Wilson (mortgagor) and the Hudson's Bay Company, the W. H. Malkin Company, the McLennan-McFeely Company, and Percy Conrad Stevenson, defendants, to enforce a mortgage by foreclosure or sale.

J. B. Pattullo, for defendants.

F. J. Stacpoole, for plaintiffs.

CRAIG, J.:—The plaintiffs sue for foreclosure or sale of a certain property covered by a mortgage to the plaintiffs for $35,000, dated 24th September, 1901. Attached to their statement of claim they give particulars of the debt, claiming a balance of $26,131.58. This statement sets out the claim as based upon a judgment recovered on 24th June, 1904, for $44,062.94, and, after charging interest, costs, and solicitors' fees, and giving credit for accounts for amounts received on rent, insurance, and collections based upon a transfer of book debts, reduce the balance to the amount stated.

The defendants are subsequent incumbrancers, except the defendant Wilson, who was the original mortgagor.

The defendants the W. H. Malkin Company and the McLennan-McFeely Company plead that they are subsequent incumbrancers and subsequent judgment creditors of the defendant Wilson, and, among various other defences, set up that the mortgage was given and accepted with respect to advances on the security of real estate directly or indirectly made at the time of taking the security in contravention of the Banking Act. They further plead that Wilson was a customer of the bank for many years. giving 4 several mortgages, one of May, 1901, one of August, 1901, one of September, 1901 (being the one sued for), and one of January, 1902, which last mortgage was for $244,000. They plead that this last mortgage covered all the preceding mortgages, which were merged in it, and the last mortgage has been paid and satisfied. They further plead that the plaintiffs have been in possession of the defendant Wilson's lands, and have recovered a larger amount of rent and returns than credit is given for; that the plaintiffs charge Wilson interest at the rate of from 12 to 24 per cent. per annum, in excess of the legal rate allowed by the Banking Act; amounting in all to over $40,000, and that if said interest taken in excess be deducted then the bank are fully paid.

The Hudson Bay Company plead similar pleas to the foregoing, and plead as well that Wilson was in insolvent circumstances at the time the debts were contracted with the bank, to the bank's knowledge; that at the time of the execution and delivery of the mortgage the defendant Wilson was insolvent and executed and voluntarily made the mortgage with intent to defeat the defendants and other creditors and to give the bank an unjust preference; that the mortgage was made collusively and fraudulently between the bank and Wilson to defeat Wilson's creditors. These pleas are raised again by way of counterclaim; and they ask that it be declared that Wilson was insolvent at the time of the making of the security, and that the security be declared void.

The present motion is to obtain inspection of documents disclosed in the affidavit of production. The affidavit of production is made by G. M. Gibbs, local manager of the bank, 25th June, 1907, and in it he recites the documents which the plaintiffs have relating to the matters in dispute,

and under item 44 he mentions "all ledgers, journals, cash-books, and books of account containing any entries in reference to the account of the defendant Wilson." No privilege or refusal to produce is claimed under this item. It appears from the affidavit of Mr. Carson, solicitor acting for the defendants, that inspection was allowed by Mr. Gibbs, and the inspection was actually going on, when the inspector of the bank, Mr. Cameron, arrived and discontinued the leave, prohibiting further inspection of the books. The bank now claim privilege, on the ground that the defendants cannot go behind the mortgage in their inspection of accounts, nor in opening up the dealings with the defendant Wilson, nor can they go behind the judgment. The plaintiffs also ask that, even if the defendants can go behind these documents, they be first called upon to prove the issue of fraud; that that issue be first tried before the inspection is allowed.

The defendants are also asking that an order be made that an expert accountant be permitted to act as agent for the defendants in the inspection of the bank's books.

I had occasion to consider very fully this question of an inspection of bank books on a very similar state of pleadings in the cases of Canadian Bank of Commerce v. McDonald, 1 W. L. R. 506, and Canadian Bank of Commerce v. Carbonneau, 1 W. L. R. 262. I have gone over the matter again and read the authorities cited to me, and I have come to the conclusion that in a case of this nature, where the parties allege fraud between the mortgagor and the first mortgagee, collusion and fraud in the obtaining of a judgment by default on confession, besides setting up wrong accounting and excess of interest, they are entitled to the fullest inspection of the books. In support of that conclusion I would cite the cases of Compagnie Financiere du Pacifique v. Peruvian Guano Co., 11 Q. B. D. at pp. 55, 64; also Williams v. Quebrada R. W. Co., [1895] 2 Ch. 751. The head-note of this last case is: "Where fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime and civil fraud, and it is immaterial for this purpose whether the solicitor is or is not a party to the alleged fraud."

Kekewich, J., in his judgment, says: "The validity of the claim of privilege depends not on the fraud but on the

charge of fraud. In my opinion, there is a clear charge of fraud, and it appears to me that the claim of privilege is invalid." I cite this case to shew that, even if privilege had been claimed in this case, when fraud is alleged it would be no answer. If, therefore, communications private and confidential between a solicitor and his client are not privileged, how much less would the accounts which are actually being attacked be privileged. I also cite Bewicke v. Graham, 7 Q. B. D. 400; Taylor v. Batten, 4 Q. B. D. 87; Bustros v. White, 1 Q. B. D. 423; and Hutchinson v. Glover, 1 Q. B. D. 138; in which last case Blackburn, J., utters the dictum that "everything which throws light on the case is prima facie subject to inspection."

To indicate that the second mortgagees have the same rights of investigation as the original mortgagor would have, I refer to the cases of Mainland v. Upjohn, 41 Ch. D. 126, and Court v. Holland, 29 Gr. 19.

As to the objection that customers' accounts are privileged from being inspected, I would refer to the cases of Hannum v. Macrae, 18 P. R. 185, and Bromley v. Graham, 11 P. R. 457. The privilege and prohibition contained in the Bank Act against the examination of customers' accounts are given for the protection of the customer himself, and are directed against the voluntary exposing of the customers' accounts by the bank, and do not prevent proper inspection of a customer's account either in an action brought by himself against the bank or an action brought by any other person standing in his rights or attacking any transaction between him and the bank, such as the one in this case, where it is alleged to be collusive, fraudulent, and preferential. Then, again, it is clear that privilege must be claimed and the grounds on which the privilege is based stated. Neither of these things was done in the affidavit on production. I think it is too late now for the plaintiffs to come in and claim that privilege which they did not claim at the proper time, particularly after they permitted inspection to go on to a certain extent. It seems to me that in a case where such allegations are raised as are made in this case, and where it is necessary that the parties attacking the transaction should obtain whatever aid can be given to them in proving their own allegations, aid should be given by inspection and production. The principle is clear that whatever matter will aid in establishing the case of the plaintiff or the party seeking production or breaking

down the defence of the defendant, must be given by production, if the documents are in the hands of the adverse party.

Then as to the question of the trial of the issue of fraud before inspection is allowed or before the other issues are dealt with: it is always desirable that all the issues be tried at the same time, firstly on account of the saving of expense, and next—in this case—it would be depriving the defendants of the conduct of their own case if the plaintiffs should be allowed to decide what issues should be tried. I think it is more convenient that all the issues in this action should be tried at the same time. Special circumstances should be shewn before any order of the kind asked for is made, that is, to try one issue before the others. For a full exposition of the law and the interpretation of the Rule upon this point, see Parcy v. Young, 15 Ch. D. 479.

As to the request of the defendants to be permitted to examine the books by an agent other than the solicitor or the solicitor's clerk, I do not think they have established a sufficiently strong case. In Bonnardet v. Taylor, 30 L. J. Ch. 523, it was held that only under special circumstances would special persons be allowed to inspect the books of the adverse party, for example, scientific experts in patent cases, or the reading of accounts in a foreign language. No such special circumstances are shewn here. All that is asserted is, that it would be more convenient, and perhaps would somewhat facilitate the inspection of the accounts, if a more expert accountant than the solicitor were allowed to see the books. I do not think these are such special circumstances as would warrant me in making the order asked for; in any event, the person to be allowed to inspect should have been named in the affidavit and his qualifications shewn. The Court has some control over its own officers, and if any person is appointed to inspect books on special grounds he should be specially appointed by name. However, in this case I do not see any special difficulty in the matter, but if special difficulty should arise and an expert accountant be needed upon a further inspection of the books, and that matter is satisfactorily shewn, then I think perhaps that a special order might be made, but only in those circumstances.

The order will go for an inspection of all the accounts of Wilson with the bank. I need not specify what particular accounts will be disclosed, but all accounts which will throw

any light upon the making up of the various accounts of Wilson for all that period will be covered by the order.

The costs of this motion will be costs in the cause.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

HANNAH v. GRAHAM.

Vendor and Purchaser—Contract for Sale of Land—Action by Vendors for Specific Performance—Defence of Fraud —Misrepresentations as to Quality and Value of Land—Caveat Emptor—Appeal—Findings of Fact.

Appeal by defendant from judgment of CAMERON, J., 7 W. L. R. 554, granting plaintiff specific performance.

The appeal was heard by HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.

J. E. O'Connor and P. C. Locke, for defendant.
W. L. McLaws, for plaintiff.

HOWELL, C.J.A.:—On the issues raised by the pleadings the learned trial Judge found for the plaintiff. He states in his judgment that he adopts the statements made by the plaintiff's witnesses. The evidence is not of the nature to lead to a reversal of this finding of fact.

In my view, the appeal should be dismissed with costs.

PERDUE, J.A.:—If I were called upon to decide this case in the first instance upon the evidence as it appears in the printed record, I do not think that I would have come to the conclusion at which the learned trial Judge arrived. The bargain was made in Winnipeg, the land which the plaintiff was giving in exchange was many miles distant, it was difficult of access at that season of the year, and, even if the defendant succeeded in getting to it, he would scarcely form any opinion as to the quality of the soil, owing to its being covered deep with snow. He was, therefore, as it appears to me, compelled to rely upon the representations of the defendant if he agreed to the proposed exchange of properties. The plaintiff, on the other hand, had an opportunity to examine and did examine the house and lot of the defendant proposed to be given in exchange.

The impression I have formed from the evidence, particularly referring to that given by the plaintiff's son, is that

the plaintiff did, prior to the conclusion of the contract, represent to the defendant that the farm land in question was a dark sandy loam 18 to 20 inches deep, that it was level, and generally that it was suitable for cultivation. Much evidence was called as to the actual quality of the land, and this evidence is of the most contradictory character. I am strongly inclined to believe that the land is very different from what it was represented to be, and that it is almost worthless for farming purposes. The learned trial Judge has, however, taken the opposite view, and has chosen to believe the evidence adduced by the plaintiff both as to what occurred during the progress of the negotiations and as to the quality of the soil. Where the evidence was so completely contradictory, and where it was quite open to a Judge trying the issues to believe the statements of one party rather than those of the other, a court of appeal should not interfere with the pure finding of facts arrived at by the Judge who saw and heard the witnesses who gave the evidence. If the defendant had succeeded in establishing that the plaintiff had made the representations alleged and under the circumstances alleged—that the defendant relied upon them, and that they were false—specific performance should be refused. Such representations would be material to the contract between these parties, and the plaintiff could not escape by saying, "You had means of information and if you had been careful you would not have been misled:" Redgrave v. Hurd, 20 Ch. D. 1; Smith v. Land Corporation, 28 Ch. D. 7.

But the trial Judge's findings both as to the alleged representations and as to their falsity are adverse to the defendant, and I do not see how this Court could properly interfere with the findings of fact upon the evidence given in this case. The appeal must, therefore, be dismissed with costs.

PHIPPEN, J.A.:—The appeal must be dismissed. The only issues of fraud tendered by the record were the subject of conflicting testimony to an extent which forbids our interfering with the trial Judge giving credit to the testimony of the plaintiff and his witnesses. Personally, had I tried the cause, I would probably have exercised a discretion against ordering specific performance, but the learned trial Judge, having accepted the plaintiff's story and decided in his favour, has put the case beyond our proper interference.

Appeal dismissed.

THE

Western Law Reporter

Vol. VIII. TORONTO, JUNE 15, 1908. No. 4.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

BEWELL v. WHEAT CITY FLOUR CO.

Master and Servant—Dismissal of Servant—Attempted Justification—Disobedience of Orders—Finding of Fact—Review by Appellate Court—Wrongful Dismissal—Damages.

Appeal by plaintiff from judgment of MATHERS, J., dismissing the action, which was brought to recover damages for wrongful dismissal. Plaintiff had been employed by defendants as a travelling salesman, his territory being Ontario. He left Ontario and came to Manitoba without the leave of the defendants, and they dismissed him for leaving the territory assigned to him contrary to the instructions he had received.

S. H. McKay, for plaintiff.

J. P. Curran, for defendants.

The judgment of the Court (HOWELL, C.J.A., PERDUE, and PHIPPEN, JJ.A.), was delivered by

PHIPPEN, J.A.:—The learned trial Judge finds "that the plaintiff's engagement was a yearly employment at $125 per month; that by the terms of his engagement he was to have the right to return to Brandon to visit his family when in the regular course of the defendants' business he was in the north-western part of Ontario; that (with the exception of one breach of duty found) the plaintiff discharged his duties faithfully."

Counsel do not object to these findings. They may therefore be accepted without reserve.

The learned trial Judge further finds "that the plaintiff, desiring to come to Brandon to visit his family, laid out a trip to the north-west for the purpose of bringing himself within the terms of his engagement, although the demands of the defendants' business required him elsewhere; that in coming to the north-western part of Ontario, the plaintiff was disobeying the reasonable instructions of the defendants and without any reasonable justification." If this finding can be supported by the evidence, the judgment appealed from must be affirmed.

The defendants' head office was in Brandon, Manitoba. The plaintiff was employed by them as a travelling agent, his territory being the larger portion of the province of Ontario. No specific instructions were given him as to the places or customers he was to visit, the time to be spent upon the road, or the rotation of his trips. The plaintiff's headquarters were in Toronto, and apparently it was intended that he should exercise his best judgment, subject of course to specific instructions from the defendants, in promoting their interests in his territory.

During the argument of the appeal I pressed respondents' counsel for evidence that the plaintiff, in visiting the north-western part of Ontario shortly before his return to Brandon, was violating his duty, but was not referred to any direct testimony on this point. The plaintiff's instructions are entirely contained in correspondence, and can therefore be dealt with by this Court more freely than if they were the subject of testimony given before the trial Judge.

A perusal of this correspondence fails to disclose any instructions which the plaintiff violated by his visit. The only directions on this point I find in the correspondence are contained in a letter dated 12th September, where it is stated: "With regard to your coming to Brandon at the present time, we think you should be on the road amongst the customers. We have frequent communications from your district asking for prices. We have before us now a communication from," etc.—naming several customers of the defendants.

The letter of the 12th was written in answer to a communication from the plaintiff to the defendants, dated 9th September, stating in part as follows: "I expect to start

over my north trip in a few days so as to reach Brandon about the 25th. I have just received a letter from my son from Brandon saying that they would leave Brandon on the 30th September for Vancouver to take charge of St. John's Presbyterian Church organ. Therefore, it is of interest to me to see them before going so far away, and, as my ticket is good to return to Brandon up to the last of September, I think a trip to your office would also be for the best interests of the business. However, I would ask you to confirm this by return mail and oblige."

It will be noticed that, although the plaintiff states he intends taking the northern trip, no objection is made in the defendants' reply. It suggests he should be on the road amongst his customers, but not that he should visit some part of the province other than as contemplated.

Apart from this, there is no evidence whatever to support a finding that in making this trip the plaintiff was neglecting the defendants' business, or that he selected this route disregarding their more pressing interests elsewhere. As by the terms of his engagement it was largely left in his discretion as to the manner in which the business should be done, it is impossible for a Court to sit in appeal from the plaintiff's judgment or to say that the defendants' interests would have been better served had the plaintiff adopted a course which apparently did not appear to him the most desirable, and of which the defendants, on his intention being declared, made no criticism.

On 14th September the plaintiff further wrote the defendants: "I will leave Toronto before you get this letter and work all the towns to the Soo and North Bay, and you may write me at the Soo, or even Sudbury, should you have occasion to do so. If any mail comes to Toronto to me, I will have it forwarded to me, and when I get to the Soo I will use the ticket I have to Brandon, as I wrote of before, unless otherwise instructed, as I am anxious to see my son and family before they leave for Vancouver on the 30th. Besides, I would like to converse with you with reference to the business for Ontario. Hoping to find good sales along the line between there and Fort William, I remain," &c.

The defendants received this letter in due course, replying on 18th September, addressing the plaintiff at Sudbury, Ontario. That letter gives some necessary instructions as to prices, but makes no reference to his proposed

visit to Brandon, nor does it in any way find fault with the plaintiff for visiting the northern part instead of some other portion of the province. On this evidence, I must hold that the plaintiff, until he reached the Soo, acted in the reasonable and proper discharge of his duties.

This being so, the plaintiff comes within the direct finding of the trial Judge allowing him when reasonably in this portion of the province to visit his family at Brandon. If the defendants believed their business interests at this particular time to have been such as to make it unreasonable that the plaintiff should then come to Brandon, it was their duty to have stated so in positive language when answering his letter of 14th September. The plaintiff was a widower, his family in Brandon were about to move to the Coast, and, unless he came to Brandon before the end of September, the object of his visit would be lost. The occasion was therefore most reasonable so far as the plaintiff was concerned. The defendants knowing that he would leave for Brandon unless otherwise instructed, and issuing no instructions to the contrary, the plaintiff was fully entitled to assume that the occasion of his visit was within the terms of his contract.

On 16th September the plaintiff further wrote the defendants, acknowledging receipt of theirs of the 12th above referred to: "I also note your objection to my coming to Brandon, owing to pressure of business. I cannot say that I am delighted with this, although I cannot expect any personal sentiment I may have for my own family will be of advantage to you. However, I did think, and I now believe, that a personal interview would be for the interest of our trade here. I had written to you on the 14th with respect to this matter, as I have laid out a trip to the Soo, working the towns between here and that point. I feel it to my personal advantage at least to have a talk over this Ontario trade, and having a ticket from the Soo to Brandon good until the last of September, I thought you would think it wise to take a run for a day or two, and now that I understand that my son is going to the Coast, and consequently breaking up my home, with him, I feel it my duty, as his only parent, to see him before leaving for the extreme West. I expect to be in the Soo by Tuesday 24th, and arrive in Brandon on the 27th, and be all ready to leave there after the first of October. Kindly reconsider this matter and oblige," &c.

To this letter the defendants sent no answer. They could have reached the plaintiff by mail or wire before he left the Soo. Under these circumstances, the plaintiff having the right to visit Brandon, I fail to see how his doing so can be considered a breach of duty warranting his dismissal.

Instead of answering either of the last two of the plaintiff's letters, the defendants allowed him to come to Brandon, and at the second interview told him curtly that he was dismissed. For this I hold there was no justification. The appeal must be allowed.

I think, under the circumstances, the damages should be placed at the equivalent of 6 months' salary, or $750. Judgment will be entered for the plaintiff against the defendants for this amount, together with costs both of the trial and appeal.

Appeal allowed.

BRITISH COLUMBIA.

MARTIN, J. MAY 21ST, 1908.

CHAMBERS.

McINNES v. BRITISH COLUMBIA ELECTRIC R. W. CO.

Discovery—Examination of Plaintiff—Nature and Scope of Examination—Rules of Court—Alteration—Omission.

Motion by defendants to compel the plaintiff to answer certain questions on an examination for discovery.

Joseph Martin, K.C., for defendants.

Edgar Bloomfield, for plaintiff.

MARTIN, J.:—This is a motion to compel the plaintiff to answer certain questions on an examination for discovery, and it is resisted on the ground that the new Rules of 1906 have introduced a change into the practice of this Court, by omiting the amendment of June, 1900, to old Rule 703, and, therefore, it is contended that the examination is no longer in the nature of a cross-examining one. But, though it is true the omission has, in some unaccountable manner, been made, yet the practice is still what I held it to be in Bank of British Columbia v. Trapp, 7 B. C. R. 354, i.e., in effect, a cross-examining one—quite apart from the amend-

ment of June, 1900. This view, in principle, was adopted on appeal in the same case, and also confirmed later by the full Court in Hopper v. Dunsmuir, 10 B. C. R. 23, wherein at p. 27 the Chief Justice, with the concurrence of Mr. Justice Irving, said: "This amendment (of June, 1900), really effected nothing, as it merely emphasizes the fact that the examination is to be a cross-examination, which was already provided for by Rule 712, and interprets the expression 'matters in question in the action' to mean 'issues raised by the pleadings.'"

Since the new Rules 370c and 370i (3) are, for the present purpose, practically identical with the old Rules 703 and 712, it follows that the decision in Bank of British Columbia v. Trapp is exactly in point, and, therefore, the present motion must be allowed, and the costs of this motion and any costs occasioned by such refusal to answer, shall be costs to the defendants in any event of the cause.

With respect to question 26, as to what the plaintiff's friend told him at the time of the accident, it is perhaps somewhat premature to expres a final opinion on it, because the circumstances which would determine that point are not fully brought out, owing to the refusal to answer other questions which clearly should have been answered. From one point of view, what was said to the witness by his friend would be relevant, and from another point it would not.

BRITISH COLUMBIA.

MORRISON, J. MAY 21ST, 1908.

TRIAL.

WATEROUS ENGINE WORKS CO. v. OKANAGAN LUMBER CO.

Sale of Goods—Action for Price—Late Delivery—Inferiority — Counterclaim — Amount Overpaid — Extra-provincial Company—Incorporation by Dominion Act—Doing Business in Province without License — British Columbia Companies Act, sec. 123 — Intra Vires — Constitutional Law.

Action to recover a balance alleged to be due to plaintiffs for goods sold and delivered.

L. G. McPhillips, K.C., and V. Laursen, for plaintiffs.

C. B. Macneill, K.C., and J. S. W. Pugh, for defendants.

MORRISON, J.:—The plaintiffs are an extra-provincial company (not licensed pursaunt to the provisions of the British Columbia Companies Act), domiciled in Ontario, and incorporated by letters patent under the Companies Act (Dominion.)

The defendants are incorporated under the British Columbia Companies Act, 1897.

The plaintiffs, pursuant to a contract executed in British Columbia by the defendants, shipped to them certain mill machinery. The order for these goods was taken by the plaintiffs' resident agent, and the contract was witnessed by him. The goods were shipped, but arrived at a period later than contemplated by the contract, as contended by the defendants, and, in consequence, other machinery had to be purchased instead. When the goods did arrive, it is further alleged by the defendants, they were faulty both in material and in construction, and were rejected. This action is brought for payment of a balance of some $500 odd on the contract price.

The point was at once raised that the plaintiffs were then and thus carrying on business in British Columbia in contravention of the Companies Act, R. S. B. C. 1897 ch. 44, sec. 123. Subject to a further consideration and determination of this point, the merits of the case were investigated, and, after hearing a number of witnesses on both sides, I have come to the conclusion on the facts that the machinery in question arrived at a period later than stipulated for in the contract, and that, in consequence of its non-arrival when contemplated, the defendants were obliged to secure other machinery to enable them to commence their operations.

I also find that the saws shipped by the plaintiffs were so faulty in material and construction as not to be in accordance with the terms of the agreement, and that the defendants were justified in refusing to accept them.

I find further that defendants took all reasonably necessary steps to so inform the plaintiffs, and that the plaintiffs knew that the saws were at their risk and disposal.

If so considered necessary, there will be an accounting before the Registrar as to the amount claimed by the de-

fendants as having been overpaid by them, as set out in paragraph 5 of the defence.

But should the plaintiffs be advised that those findings are not justified by the evidence, I venture upon a consideration of the other aspect of the case.

Counsel for the defendants moved to dismiss the action, urging that the order having been taken by the plaintiffs' agent here, and the contract having been signed here by the defendants, though subject to ratification in Ontario, the contract sued upon was made in British Columbia, and is therefore illegal and void by reason of the 123rd section, supra: North-Western Construction Co. v. Young, 13 B. C. R. 297, 7 W. L. R. 397.

I think the plaintiffs, in the circumstances, were carrying on or doing business in British Columbia under a contract made in British Columbia.

Counsel for the plaintiffs contend that the British columbia Companies Act is ultra vires, inasmuch as it interferes with the "status" of a company created by the Dominion. From my understanding of the meaning of the word "status" as used in this connection, I am strongly of opinion that that is exactly what the section in question does not do. In support of this contention, my attention has been directed to the existence of the word "such" in the 5th line of sec. 123. It is contended that the province thereby has the right to curtail the powers of a federal company when issuing a license. With due respect, the words of Bacon, V.-C., in Cleve v. Financial Corporation, 43 L. J. Ch. 61, occur to me, viz., "that in a great many judgments, well expressed and well considered, a part of a sentence or a piece of a line may be extracted so as to sustain anything that is desired to be founded upon it." Having regard to the whole section, can it mean more than "such" of its powers as the company may seek to exercise in the province.

Section 123 cannot operate to repeal a federal Act. It cannot be invoked to reconstitute or dissolve a company; it cannot enforce its amalgamation or liquidation; it cannot regulate or affect a company's dealings in respect to transfer of shares. And transfers involve a change in status: In re National Bank of Wales, 66 L. J. Ch. 223.

In short, it cannot, nor is it intended in any way to, limit or interfere with the capacity or status of the plaintiff company.

The Dominion has given the plaintiff company the capacity, the status, to carry on certain business throughout Canada, consistently with the laws of that particular province in which it seeks to extend its operations. In this case the pre-requisite is the securing of a license: Colonial Building and Investment Association v. Attorney-General for Quebec, 9 App. Cas. 157.

See also the leading cases collected in Lefroy on Legislative Power, p. 617 et seq.

On this branch of the case I think the plaintiffs also fail.

There will be judgment for the defendants dismissing the plaintiffs' action with costs.

BRITISH COLUMBIA.

LAMPMAN, CO. C.J. MAY 28TH, 1908.

COUNTY COURT OF VICTORIA.

GRAHAM v. BRICKLAYERS AND MASONS' UNION.

Trade Union—Interference between Master and Servant—Procuring Discharge of Servant—Actionable Tort—Damages—Injunction.

Action for damages for interference by defendants with plaintiff's employment.

J. P. Mann, for plaintiff.

H. B. Robertson, for defendants.

LAMPMAN, CO. C.J.:—The defendants, besides representing themselves, represent all person constituting the Bricklayers and Masons' Union No. 2 of Victoria.

The plaintiff, an Englishman, 48 years of age, is a stonemason, and he came to Canada in 1904, and settled in Calgary, where he worked at his trade. In Calgary he joined the local branch of the Bricklayers and Masons' Union, which is about the same as the local union here, both being affiliated with the Bricklayers and Masons' International Union of America. He became president of the Union in Calgary, but before leaving for Victoria, where he arrived in March, 1905, he had become a contractor, and so had lost his membership. Plaintiff secured work with a contractor named Bathier at laying concrete blocks, and working along with him was Harry Owen, a member

of the local union, and, after some conversation about the impossibility of Owen working with a non-union man, Graham told him he would join the union, and gave him $5 as a portion of the initiation fee. At the next meeting of the union (26th August) Owen paid in the $5, but Graham was not elected, and the $5 was ordered to be repaid to him, as no two members would vouch for him being a bricklayer, as required by sec. 2 of art. 5 of the local union's rules, which is as follows: "All members proposed for membership to this union must be practical bricklayers or masons, who, by paying the initiation fee and being vouched for by two members in good standing, shall be eligible for membership; and any member vouching for a person who is not a practical bricklayer or mason shall be fined the sum of $5, and no member of this union will be allowed to work with any member so fined until said fine is paid."

On 9th September the matter again came before the union, and two members, the defendants Jones and Williams, were appointed a committee to give Graham "a trial test as to his ability" and to report at next meeting. This committee decided to give Graham a test laying boulder rock, but Graham refused such a test, saying that he was used to sand-stone work, and that he considered a test on boulder work unfair to him. The matter dragged along until late in October, when the defendants Jones and Pike had an interview with Graham and told him he could have a test on any kind of stone work he liked, but Graham did not accept the offer. The evidence shews that the bulk of the stone work in Victoria is boulder work, and I can see nothing unreasonable in requiring a stone mason who is going to work in Victoria to understand boulder work. Mr. Mann seeks to shew that the union was astute in finding reasons for rejecting Graham's application for membership, and suggests that inquiries could have been made of fellow workmen, and that the committee could have inspected Graham's work on jobs where he had been employed. That sort of thing is contemplated by sec. 2 of art. 5, but when no two members would vouch for the applicant, a practical test seems a fair way of ascertaining the applicant's ability. It is a much better way than asking questions of some friend—or of some enemy. I think the stand taken by the plaintiff was stubborn and unreasonable. If the union had any ulterior motive, no suspicion of it was disclosed at the trial.

On 14th October Graham was still working for Bathier, and at a meeting held that evening a resolution was passed instructing the secretary to notify Bathier that if he continued to employ Lawrence Graham, all union men would be called off his work, and that same night Knott, the secretary, wrote the following letter:—

Bricklayers and Masons' Union No. 2 of Victoria, B.C.
Victoria, B. C., Oct. 14th, 1907

Mr. Botheur,

Dear Sir,—I am instructed to notify you that as the members of the above union claim the work of setting the concrete blocks, and, as it is contrary for members of this union to work with any who do not belong to it, that our members cannot work with Lawrence Graham, and, should you keep him on at the work, all union bricklayers and masons will be called off your work. Hoping you will see your way clear to employ only union men,

I remain yours truly,
R. P. Knott, sec.

9141 Caledonia Avenue.

This letter was handed to a member named Clay who worked for Bathier. The next morning Clay handed the notice to Bathier, saying: "You see what it is, what are you going to do? We want to know so that we will know what to do." In the meantime Clay and the two other union men kept their coats on until Bathier told them that he would let Graham finish the day. Bathier shewed the notice to Graham, and told him he would have to let him go, and after that day he employed him no longer, although he had plenty of work for him, and would have continued to employ him at $5 per day but for the intimation contained in the notice. The plaintiff says he has been unable to obtain employment since at his trade on account of this notice. and he claims an injunction and $500 damages.

Although questions closely allied to the one for determination have been discussed at great length during the last few years in British and American Courts, the precise point now raised is not covered (so far as counsel have been able to ascertain) by any decision having the force of authority in British Columbia. In the United States the decisions are not uniform, and their Supreme Court has not yet dealt with the question. The result of the authorities is, I think, that the defendants are liable unless they can shew sufficient justification for their acts. What is or is not sufficient justi-

fication must depend on the circumstances of each case, as Lord Justice Romer says in the Giblan case, infra, and in that case the Court would not commit itself in any general terms to saying what would amount to a justification.

Lord Bramwell in Regina v. Druitt, 10 Cox C. C. 592, 600, said: "The liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body." And Sir William Erle, in a passage often quoted, points out that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition:" Erle on Trade Unions, p. 12.

The latest English case is Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland, [1903] 2 K. B. 600, in which the Court of Appeal held that the officers of a trade union were not justified in continuing to prevent and in fact preventing a workman, who is or has been a member of the union, from obtaining or retaining employment in his trade, to his injury, merely with the object of enforcing payment of a debt due from him to the union. Giblan had been a branch treasurer of the union, and, while in office, he misappropriated £36, for which the union sued and obtained judgment against him, and, as he did not pay up, the defendants procured his dismissal from his employment by telling his employer that, if he was allowed to continue work, the other labourers who were members of the union would be called out. Giblan was eventually expelled, and after his expulsion the officers of the union prevented him from obtaining or retaining his employment, by inducing his fellow-labourers to refuse to work with him.

In Huttley v. Simmons, [1898] 1 Q. B. 181, Darling, J., decided that a cab-driver had no right of action against the

defendants for damages caused by reason of their having induced a cab proprietor to refuse to engage him to drive a cab. What Simmons relied on as justifying his conduct does not appear in the report, and, as Lord Lindley says in Quinn v. Leatham, [1901] A. C. at p. 540, "it is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated."

In Perrault v. Gauthier, 28 S. C. R. 241, the declaration set up the following incident (I omit the others, as they are not dealt with in the judgment) in support of the plaintiff's claim, viz., that on a later occasion when he (the plaintiff) had obtained employment in Perrault & Riopel's stone yard, the union men employed there, on being told that he belonged to an opposition union, left work "without saying a word or giving any reason; that this 'strike' was maliciously instigated by the defendants and their union who had posted him as a 'scab,' on account of his having left their union, and he was in consequence compelled to quit work there in order to avoid causing loss to his employers (one of whom was his brother), and that, as a result of such combination and conspiracies, he was deprived of the means of earning a living at his trade in any stone-yard in Canada or in the United States." The plaintiff was not dismissed by his employer, but left because he thought it to his employer's advantage for him to do so, and the Supreme Court of Canada held that he could not recover against the officers of the union, founding their decision on Allen v. Flood, [1898] A. C. 1, a case which seems to have been imperfectly understood until explained by the House of Lords in Quinn v. Leatham, [1901] A. C. 540, 70 L. J. P. C. 76.

In Glamorgan Coal Co. v. South Wales Miners' Federation, 72 L. J. Q. B. 893, the circumstances were that middlemen at Cardiff were attempting to reduce the price of coal, and it was feared that some employers might yield to the pressure of competition and make a reduction, with the result that the wages of the miners would be reduced. To counteract this, and decrease the output, the defendants ordered certain stop days on which the men were to cease from work, without giving the notices required by the sliding scale agreement, and in this way knowingly procured the men to break their contract with the plaintiffs. It was held by the Court of Appeal, per Romer, L.J., and Stirling, J., Vaughan-Williams, L.J., dissenting, that the defendants

had interfered with the contractual relations between the plaintiffs and their workmen, and that the circumstances shewed no sufficient justification for that interference.

In Martell v. Victorian Coal Miners' Association, 29 Vict. L. R. 475, the facts were that the defendants determined that they would not work with the plaintiff, who had broken the rules of another association, and they determined to get him out of the mine by informing the mine manager that they would not work with him; but the plaintiff was not removed by the owners, and the defendants called the miners out on strike. As a consequence of the strike, there was no work for the plaintiff, and he left the district, whereupon the other miners went back to work. Plaintiff then sought re-employment, but the employer was afraid to take him back, knowing that if he did there would be trouble again. The strike took place after 8 days' notice, although the miners were under agreement not to quit work without giving 14 days' notice. The full Court of Victoria decided in favour of the plaintiff.

It will be seen that Graham's case differs from each one of the above cases. In Perrault v. Gauthier it did not appear that plaintiff was dismissed from his employment. Graham was dismissed. In the Glamorgan and Martell cases the defendants induced the men to break a contract. Graham was not under contract (i.e., his contract could be determined at the end of each day), and the defendants in getting him discharged did not procure the breach of any contract.

In the Giblan case the object of the defendants was to enforce payment of a debt due from plaintiff to the union. The defendants' object in getting Graham discharged was different.

In Allen v. Flood, [1898] A. C. 1, the defendant, who had no authority to call out the men, simply warned the plaintiff's employers of what the men without his persuasion or influence would do in case the plaintiff was not discharged. Plaintiff was discharged by reason of the facts communicated to him by defendant, but the House of Lords held that defendant was acting within his rights. No case of conspiracy or combination was made out in that case.

In Graham's case there was a combination, and the defendants had the power to call out the men.

The justification set up by the defendants is the desire on their part as union men to obtain employment for union

men, and so benefit the union and its members, and generally help the cause of unionism. They knew that, if Bathier yielded to their request, Graham would have to go or else join the union. Their notice to Bathier does not merely give him the option of employing either Graham or union men, but it conveys an invitation that he dismiss Graham—see the last sentence in it: "Hoping you will see your way clear to employ only union men."

If a union is not justified in preventing a man from getting employment, with the object of enforcing payment of a debt due from him to it, I should say it would follow that it would not be justified in preventing his employment with the object of forcing him to join its organization: and see judgment of Lord Brampton in Quinn v. Leathem, 70 L. J. P. C. 89.

Now it must be remembered that neither the union as a whole nor any of its members had any objection to Graham on account of any conduct or personal habits of his, but the objection to continuing work with him was solely because he did not belong to the union. I fail to see any good ground for holding that the defendants were justified in invading the plaintiff's rights as they did. In Eddy on Combinations, vol. 1, p. 416 (as quoted in Erdman v. Mitchell, 56 Alt. at pp. 332-3), the author lays down the principles on which I think this action should be properly decided adversely to the defendants. He says: "The Courts recognize the rights of workingmen to combine together for the purpose of bettering their condition, and in endeavouring to attain their object they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to obtain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and, while it may be argued that indirectly the discharge of the non-union employee will strengthen and benefit the union, and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted

upon the non-union workmen, that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union."

In the Giblan case, Mr. S. T. Evans, K.C. (now the Solicitor-General), the senior counsel for the union, was careful to point out that it was not the policy of the union to prevent its members from working with non-union men: see at p. 612 of the report in the Law Reports.

In his word on Torts, 7th ed., Sir Frederick Pollock, after discussing the question now raised, which he says has not been fully disposed of yet, goes on to state, at p. 326: "Possibly it may turn out to be the law that, generally speaking, persuasion and advice are free and of common right; but that, when persuasion is acted upon to the damage of a third person, such damage being intended by the persuader or a natural and probable consequence of the act, the persuader is liable to an action at the suit of the person damaged if he has either used unlawful means, such as intimidation (whether open or disguised as persuasion) or corruption, or procured a criminally punishable or fraudulent act; and that he is also liable, but subject to exceptions in the nature of privilege, if the act procured was a breach of contract or a merely civil wrong, not involving breach of the peace or fraud. This would give, it is submitted, an intelligible and fairly acceptable rule. No one, however, is more conscious than the writer that in the present state of the authorities all conjectures on this subject must be advanced with the greatest diffidence."

Applying this test to the circumstances of the present case, I should say that the defendants are liable, as the "persuasion" used by them as contained in the secretary's letter was really a threat, and it had the effect of frightening Bathier into acceding to the "hope," as he wanted his work to be gone on with.

In Massachusetts a labour union cannot by a strike refuse to work with another workman for an arbitrary cause (see Barry v. Donovan, 74 N. E. Repr. 603); but in New York the law is the other way (see National Protective Ass'n v. Cumming, 63 N. E. Repr. 369); but there Chief Judge Parker, in delivering the judgment of the majority of the Court of Appeals, says, at p. 373: "But it seems not out of place to suggest that the decisions of the English Courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the

fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions."

In regard to the above remark about "the spirit of our institutions," I would point out that the English decisions referred to were founded on what the English Judges considered to be the true principles of personal liberty, and an aversion to coercion or intimidation, irrespectively of considerations as to by whom used. These decisions are applicable to the actions and combinations of employers as well as to trade unions.

And the Courts in the United States whose decisions have been different from the New York one cited, based their decision on that part of the Declaration of Independence which says: "We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness;" and like assurances of personal liberty which have been embodied in State Constitutions.

The plaintiff is entitled to damages, and in respect to the amount, I understand the defendants wish to be heard: if the plaintiffs want an injunction, that matter can be spoken to at the same time.

ALBERTA.

STUART, J. MARCH 28TH, 1908.

CHAMBERS.

PORTER v. ROONEY.

Landlord and Tenant — Overholding Tenant — Summary Proceeding to Recover Possession — Originating Summons — Jurisdiction of Local Judge — District Courts Act, sec. 42—Practice—Rule 469—Relationship of Landlord and Tenant—Agreement for Assignment of Reversion to Person Assuming to Proceed as Landlord—No Transfer of Title—Right of Tenant to Remain in Possession—Payment for Improvements—Option of Purchase.

Originating summons to recover possession of demised premises from an overholding tenant.

L. M. Johnstone, Lethbridge, for plaintiff, the landlord.

C. F. Harris, Lethbridge, for defendant, the tenant.

STUART, J.:—This is an originating summons issued under sec. 469 of the Judicature Ordinance, whereby the plaintiff seeks to recover possession of certain hotel premises in the city of Lethbridge from the defendant as an overholding tenant. The summons was issued by Judge Winter, Judge of the District Court of Lethbridge, in his capacity as local Judge of the Supreme Court. The summons is intituled "In the Supreme Court," and bears the seal of that Court. The summons is made returnable "at Judge's Chambers at the court house in the city of Calgary." The only proper inference to draw from this is that the summons was returnable before a Judge of the Supreme Court, because Judge Winter could not, of course, exercise jurisdiction at Calgary. Upon the return of the summons Mr. Harris, who appeared for the defendant, took the preliminary objection that Judge Winter had no jurisdiction to issue the summons in the first instance. It seems to have been assumed from the beginning by all parties that the District Court Judge could not have heard and dealt with the application finally, and it was contended by Mr. Harris that, inasmuch as this was the case, the District Court Judge could not, therefore, issue the summons in the first instance.

I do not think this objection can be sustained. Section 42 of the District Courts Act reads as follows: "The Judge of every district shall in all actions in the Supreme Court brought or proposed to be brought in his district . . . have concurrent jurisdiction with, and the same power and authority as, a Judge of the Supreme Court, save as hereinafter mentioned, and in the exercise of such jurisdiction may be styled 'Local Judges (sic) of the Supreme Court.'"

Sub-section 2 of this section contains a number of matters which are excepted from the jurisdiction of the local Judges, but I do not find in any of the clauses anything which, in my opinion, could be held to include the issue of an originating summons. Clause (a) of sub-sec. 2 reads, "opposed motions for judgment, either summary or otherwise." These words are very suggestive upon the point in question, because where a motion for judgment is made by way of summons it is impossible to know whether the motion is to be opposed or not until the return of the

summons, and this would indicate that, although the local Judge might issue the summons in the first instance, yet if, on the return of it, it should be opposed, his jurisdiction would cease, and the matter would have to be adjourned before a Supreme Court Judge. This, I think, shews that it was not intended that the jurisdiction to issue a summons should depend upon jurisdiction to hear the application itself. I do not wish to be understood as suggesting that it would in all cases be proper for a District Court Judge to issue a summons in any of those matters set forth in those clauses of sub-sec. 2 in which the word "opposed" does not appear. But it is clear that this application is not specifically covered by any of these clauses. No doubt, the reason why the summons was made returnable before a Supreme Court Judge was because the disposition of the matter was considered to be in the nature of the trial of an action, inasmuch as proceedings by way of originating summons are generally held to be included in the term "action;" and "trials of actions" are specifically excluded from the jurisdiction of the local Judge, both in sub-sec. 2 of sec. 42 and in sec. 44. I can, however, discover nothing which forbids the local Judge to direct the issue of an originating summons, as was done in this case. As far as I have been able to discover, the English practice is that the originating summons is issued by the registrar or deputy registrar, and is not signed by the Judge before whom it is returnable, although his name is indorsed upon it. Our Rule says that an originating summons shall be sealed with the seal of the Court, but does not provide for signature by a Judge. It is only in the form in the schedule to the Ordinance that there is any indication that it must be signed by a Judge. It seems to me that the issue of an originating summons is very much like the issue of a writ of summons, each being the means of commencing an action; and, although the form no doubt indicates by the use of the letters "J. S. C." that it must be signed by a Judge, yet I can see no reason why a District Court Judge, acting as a local Judge of the Supreme Court, should not in such a case as this direct the issue of the summons and attach his signature to it, particularly when there is nothing expressly excepting such an act from the jurisdiction given him. For these reasons, I think the first objection must be overruled.

The defendant's counsel also took a further objection, which is rather in the nature of a preliminary objection.

He contended that the affidavits filed on behalf of the plaintiff did not shew that the relation of landlord and tenant ever existed between the plaintiff and the defendant, and that therefore the facts did not bring the case within the meaning of Rule 469 of the Judicature Ordinance.

The facts are that one H. T. Cherry granted a lease of the premises to the defendant for a term of 3 years from 1st March, 1903, and that under a renewal lease contained in the lease a verbal agreement for a renewal for a further term of 2 years was made between Cherry and the defendant. The extended term would, therefore, expire on 1st March, 1908. Some time in October or November, 1907, Cherry entered into an agreement with the plaintiff for a sale of the premises, and agreed to give the plaintiff possession on 1st March, 1908. A certain portion of the purchase price was paid in cash, and the remainder was to be paid by instalments. The title, however, to the property still remains in Cherry, as the abstract shews. The defendant refused to give up possession to the plaintiff after 1st March, and this is the reason for the present proceeding.

The question is: Can the plaintiff take advantage of the summary method provided by sec. 469? It is with a great deal of reluctance that I have come to the conclusion that it is impossible for him to do so, and that I must sustain this second objection. The point appears to me to be exactly covered by a decision in the Court of Appeal in England in Casey v. Hellyer, 17 Q. B. D. 97. That was a case under Order III., Rule 6, of the English Rules of 1883, which provides for the special indorsement of a writ of summons in a number of cases, among which are included "actions for the recovery of land with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant." The original landlord had died, and the action was brought by a receiver of his real estate appointed by the Court, and by the devisees under the will, and by an assignee of one of the devisees. The action was for the recovery of land upon the expiration of the lease. It was objected that the provision for a special indorsement of the writ did not cover such a case. The Court of Appeal upheld this objection, and all the Judges were quite clear in their expression of opinion that the provision I have quoted must be confined

to very simple cases. Esher, M.R., said: "It was intended to include only the most simple cases between landlord and tenant, where it is unnecessary to prove devolution of title, at least on the part of the plaintiff, as, for instance, where the plaintiff claims to enter under the terms of a lease or agreement granted by himself, or where the defendant has attorned to the plaintiff by payment of rent, or is otherwise estopped from denying the plaintiff's title." Lindley and Lopes, L.JJ., use practically the same language.

Now, our Rule 469 says: "Proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced," i.e., by originating summons. It seems to me that this Rule must receive the same interpretation as the Rule which the Court were interpreting in that case, because both Rules purport to provide a summary method by which a landlord may recover possession from an overholding tenant, and the conclusion I draw from the case is that the relation of landlord and tenant must have existed between the plaintiff and the defendant at some time or other, and that this relation must have arisen by direct dealing between the parties themselves. In this case it is impossible to say that Porter and Rooney ever occupied the position of landlord and tenant with respect to each other, at any rate as the result of any direct dealings between the two parties themselves. The lease was given by Cherry. The case I have cited shews that even an assignment of the reversion by Cherry to Porter, i.e., a transfer of the fee, would not of itself put Porter in a position to take advantage of the Rule, at any rate not until Rooney had paid his rent to Porter, or had done some other act which estopped him from denying that Porter was his landlord. In this case nothing of the kind occurred. Cherry has not even assigned the reversion to Porter, because the document of 1st November does not pretend to do so. But, even if he had done so, the case cited shews that that would not have been enough. If Rooney had paid rent to Porter, he would have been estopped from denying that Porter was his landlord, but he never did so, as far as the evidence shews. Nor did anything else occur between Rooney and Porter which would estop Rooney from denying that he was ever the tenant of Porter, or, indeed, from denying Porter's title generally. It is true he would be estopped, I think, owing to what

occurred, from denying that his tenancy expired on 1st March, but that is a different question. The principle of the case I have quoted seems clearly to be this: that the relation of landlord and tenant must have existed between the plaintiff and the defendant during the currency of the defendant's tenancy, and that this relation must have its origin in direct dealings between the parties. Porter, no doubt, became entitled to possession after 1st March, and Rooney, by holding over, became, in a certain sense of course, his tenant, i.e., he would be liable for occupation rent; but that is quite a different thing from the existence of that direct relation of landlord and tenant by agreement or by estoppel to which I have referred. I think I am bound to follow the authority which I have quoted, and to hold that the Rule must be limited in the way I have shewn, and that, therefore, the plaintiff was not entitled to proceed under it.

It is, however, quite clear to me that if the proceedings had been taken in the name of Cherry, he would, upon the evidence, have succeeded in getting the order asked for, because the only reason suggested by the defendant's counsel for remaining in possession was that he should first be paid for certain improvements. I can find no authority for the contention that a tenant has a right to retain possession of the premises after the expiration of his lease until he has been paid for improvements made by him. Nor can I see that, even if the defendant were right with regard to the question of the option to purchase contained in the lease, he would have any right to hold over. A breach of that covenant, if there were one, could only give an action for damages. If, therefore, this application were renewed upon the present evidence in the name of Cherry as plaintiff, I would at once give the order asked for, and I trust that the defendant will take notice of this expression of opinion and govern himself accordingly. The present application, however, must be dismissed with costs, for the reason I have given. The costs of the defendant will not be taxable until the affidavit and abstract used by him are properly stamped.

ALBERTA.

BECK, J. APRIL 6TH, 1908.

TRIAL.

JONES v. TWOHEY.

Chattel Mortgage—Registration in Province of Saskatchewan —Fraudulent Removal of Goods into Alberta and Sale to Innocent Purchaser—Action in Alberta by Mortgagee against Purchaser for Conversion—Territorial Bills of Sale Ordinance—Effect of—Alberta Act—Saskatchewan Act — Registration Districts — Re-registration on Removal — Validity of Mortgage as against Purchaser—Description of Goods — Sufficiency — Damages for Detention—Interest on Price Paid.

Action for damages for conversion of goods, and in the alternative for a return of the goods and for damages for detention.

W. L. Walsh, K.C., for plaintiff.

James Muir, K.C., for defendant.

BECK, J.:—The plaintiff was mortgagee of the goods under a mortgage made and duly registered in the proper registration district in the province of Saskatchewan. The mortgagor fraudulently removed the goods to Alberta and sold them to the defendant, who bought them bona fide within 10 days of their removal. The statement of defence, besides traversing the allegations of the statement of claim, set up that the provisions of the Territorial Bills of Sale Ordinance, which formed part of the body of law which, by virtue of the Alberta and Saskatchewan Acts, was continued in force in the provinces of Alberta and Saskatchewan, were in a number of specified respects not complied with, and particularly that a certified copy of the mortgage had not been filed in the registration district to which the goods were removed.

Mr. Muir, K.C., who had been called upon to act as counsel for the defendant just before the trial began, stated at the conclusion of the evidence that he was not prepared to argue the case, and, as the Court was to adjourn on the

following day but one, it was agreed that written memoranda of the arguments might be sent to me, but I thought it well, nevertheless, to express my opinion tentatively at once, and having done so, with some reference to authority, Mr. Muir the following day accepted my opinion as correct.

As the points involved are of some importance, I have thought it well to make this memorandum of my reasons for judgment.

I held (1) that the Territorial Ordinance has, since the taking effect of the Alberta and Saskatchewan Acts, no different or more extensive effect than if it were an Act of the legislature of either province; that that Ordinance is effective as a law of either province only within the limits of the province, and that, consequently, so far as its provisions refer to registration or registration districts beyond the limits of one province, those provisions never became effective as the law of that province; in other words, that the question of the validity of the mortgage must be dealt with as if the province of Saskatchewan had passed a Bills of Sale Act not purporting to be operative beyond the limits of that province.

Authority for this opinion, in addition to the Alberta Act and the Saskatchewan Act, is scarcely needed, but I may refer to Parsons on Contracts (9th ed., 1904), vol. 2, pp. 720-1, where the following propositions are laid down: (1) "Laws have no force by their own proper vigour beyond the territory of the State by which they are made; excepting for some purposes the high seas or lands over which no State claims jurisdiction. Without this limit they have no sanction." (2) "All laws duly made and published by any State bind all persons and things within that State." (3) "Every State may, by its own laws, bind all its own subjects or citizens, wherever they may be, with all the obligations which the law tribunals can enforce." (4) "Foreign laws may have a qualified force or some effect, within a State, either by the comity of nations . . . or by special agreement."

I held (2) that, inasmuch as the mortgage was shewn to be good as between the parties, and to have been duly recorded in the registration district of the province of Saskatchewan in which the goods were then situate, in accordance with the provisions of the law of the province of Saskatchewan, the mortgage was good both as between the parties and as against creditors and subsequent purchasers everywhere.

Cammell v. Sewell, 5 H. & N. 728, and Castrique v. Imrie, L. R. 4 H. L. 414, are the leading English cases establishing this position. Bonin v. Robertson, 2 Terr. L. R. 21, is a decision of our own Court en banc. American authorities are National Bank v. Massey, 17 L. R. A. 127; Handley v. Harris, 17 L. R. A. 703; Sheppard v. Hynes, 52 L. R. A. 675.

I held (3), a question having been raised as to the sufficiency of the description of a comparatively small portion of the goods, in view of the provisions of the Bills of Sale Ordinance in that regard, that for the validity of the mortgage beyond the limits of the province of Saskatchewan, even as against creditors and subsequent purchasers, it was sufficient to shew that the mortgage was good as between the parties according to the law of the situs of the goods at the time of the making of the mortgage. Independently of statute, a mortgage is, of course, good not only between the parties but as against creditors and subsequent purchasers without registration, and that everywhere. Provision was first made by statute that a mortgage should be void as against creditors and subsequent purchasers unless registered in the district where the goods were situate at the time of the mortgage; provision was subsequently made by statute requiring registration in case of removal of the goods to another registration district. These statutes were effective only within the territory over which the legislature which enacted them had jurisdiction, and it seems to me were obviously and necessarily intended to protect creditors and subsequent purchasers seeking to enforce their claims within the same judicial territory; and hence that such registration is not necessary in order to preserve the validity of the mortgage as against creditors and subsequent purchasers seeking to enforce their claims in other jurisdictions.

I find that this view is sustained by American authority. Marvin Safe Co. v. Norton, 48 N. J. Law 410, 5 Cent. Repr. 341 (a decision of the Supreme Court of New Jersey), was a case of a conditional sale, but the principle seems to be the same. The contract was made and the goods were situate in the State of Pennsylvania. By the law of Pennsylvania the reservation of title to the seller on a conditional sale, though good as between the parties, is invalid as against creditors and bona fide purchasers. Almost immediately after the making of the contract, the goods were transferred to New Jersey, where the local law requires registra-

tion of contacts by way of conditional sales for their validity as against creditors and subsequent purchasers. The goods were sold in New Jersey to a bona fide purchaser there. It was held that the title of the latter could not prevail against the title of the original seller.

The case of Weinstein v. Freyer, 12 L. R. A. 700 (a decision of the Supreme Court of Alabama), was also a case of a conditional sale. It was there held that the question whether or not the conditional vendor has complied with the requirements made necessary by the law of the State where the property was situate at the time of the conditional sale, in order to maintain its validity as against subsequent purchasers, is immaterial as between the conditional vendor and a subsequent purchaser of the goods who purchased them in another State, in which he was seeking to enforce his claim. The Court says: "Recording, which is to be done subsequent to the contract, is required to make the reservation of title complete against third parties. The omission to record operates in the nature of a forfeiture of the reservation of title as to creditors and purchasers. The question is not one of validity and construction, but of notice by registration and priority of right. The failure to record does not divest the original vendor of the title, but debars its assertion against third parties, conferring upon them, if creditors, a lien, and if purchasers, a right, prior and superior to the vendor's reservation of title; . . . when the validity and construction of the contract between the parties, their rights and obligations, was determined by the statute of Georgia (the situs of the goods at the time of the original sale), that statute had no further force. All questions pertaining to the nature and extent of the remedy are governed by the lex fori." The Court had previously said: "The rule that the validity, interpretation, and legal effect of a contract are governed by the lex loci contractus" (in the case of transfers inter vivos by the lex situs) "applies only to the determination of the rights and obligations of the parties to the contract. The statute of Georgia does not affix a certain construction and legal effect to the contract or impair the validity of any stipulation or condition as between the parties. It did not enter into the contract as an element, and did not affect the rights and obligations of the parties in its inception." The Court also quotes from Harrison v. Sherry, 9 U. S. (5 Cranch.) 289, 3 L. Ed. 104, as follows: "But the right of priority forms no

part of the contract itself. It is extrinsic, and is rather a personal privilege dependent upon the laws of the place where the property lies, and where the Court sits which is to decide the cause."

The same principles are laid down in Ex p. Melbourn, In re Melbourn, L. R. 1 Ch. 64. In the course of the judgment it is said: "Now I do not think there is any dispute as to the general principle of law which should govern this case. It is fairly laid down in the case of De la Vega v. Vianna, 1 B. & Ald. 284. In the construction of a contract the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is according to the law here. The real question is, does this article 152 (of the Dutch Indian Civil Code) prevent there being a contract at all, or modify the proper construction of the contract; or is it a mere provision with reference to the remedy on the contract? . . . It is admitted that, as between husband and wife, there is a debt and a binding contract. Then, what is the meaning of saying it shall not be binding as between third parties, or it shall not affect third parties? Surely it only means that in an administration of the assets of the husband in bankruptcy this claim is to be postponed to the claims of all other parties. No doubt, if a bankruptcy had taken place in Batavia, inasmuch as the law with respect to registration of the deed had not been complied with, any claims the wife might have against her husband would be postponed to the claims of all third parties; but there is no such law here." The wife was held entitled to rank pari passu with the English creditors.

Thirdly, I pointed out that the Supreme Court of Canada in Hulbert v. Paterson, 36 S. C. R. 324, had held that in case of the removal of mortgaged goods the statutory provision for re-registration in the district to which the goods were removed was not applicable where the sale by the mortgagor took place within the time limited for re-registration.

It was subsequently arranged that the goods should be returned by the defendant to the plaintiff, and a question arose as to the basis on which the damages for detention should be calculated. On a discussion of this question it was conceded and agreed that, inasmuch as the plaintiff was a mortgagee only, the damages should be calculated on the basis of interest on the price paid by the defendant for the goods, and it was accordingly so ordered.

ALBERTA.

BECK, J. APRIL 7TH, 1908.

TRIAL.

DE CLERVAL v. JONES.

Vendor and Purchaser—Contract for Sale of Land—Substantial Deficiency in Acreage—Action by Purchaser for Specific Performance with Abatement in Price—Mutual Mistake — Executed Contract — Remedy — Rescission—Option—Election—Unfounded Allegation of Fraud—Costs.

Action by purchaser against vendor for specific performance of a contract for the sale and purchase of land, with an abatement of the purchase price or damages for deficiency in acreage.

P. J. Bergeron, for plaintiff.

W. L. Walsh, K.C., for defendant.

BECK, J.:—This is an action by De Clerval, purchaser, against Jones, the vendor, for specific performance of an agreement dated 22nd September, 1905, with an abatement of the purchase price to the extent of $575, or in the alternative for damages, by reason of a deficiency in the area of the land represented by the difference between 160.86 acres and 97 acres.

The description of the land as stated in the agreement is: "All that portion of sec. 33, tp. 18, rge. 29, west of the fourth meridian in the province of Alberta, lying south of High River (subject to any trail or roadway that may be opened by the goverment), containing according to the Dominion government survey 160.86 acres."

The agreement is for the sale of "all his (the defendant's) interest in" the above mentioned land. The consideration expressed is $626.66, payable $100 in cash and $525.66 with interest at 6 per cent. on 1st January, 1906.

The agreement contains a covenant on the part of the defendant to the effect that on payment of the said sum and interest he will convey "by a good and sufficient assignment of the Calgary and Edmonton Land Company agreement No. 2772 all the said piece or parcel of land above

described . . . freed and discharged from all incumbrances, but subject to the conditions and reservations in the original grant from the Crown."

The Calgary and Edmonton Land Company's agreement is dated 31st March, 1904, and contains a like description of the land, with the addition of the words "be the same more or less," which do not appear in the agreement in question. The consideration is stated to be "the sum of $980, together with survey fees amounting to 10 cents an acre payable with the final instalment of purchase money." The receipt of $163.33 is acknowledged as received on account of principal, and the deferred payments with interest at 6 per cent. are stated as follows:

2nd Payment	31st March,	1905,	Principal	$163 33,	Interest	$49 00
3rd "	"	1906,	"	163 33,	"	39 20
4th "	"	1907,	"	163 33,	"	29 40
5th "	"	1908,	"	163 33,	"	19 60
6th "	"	1909,	"	163 33,	"	9 80
Survey fees	"	1909,	"	16 08,		

The agreement between the plaintiff and defendant was negotiated at High River between the plaintiff and one Riley, acting as agent for the defendant, who lives at Calgary.

The plaintiff says in substance that in his negotiations with Riley he offered to buy at $6 an acre; that Riley said he would have to communicate with Mr. Jones; that later Riley said the price would be $8 an acre; that having been told by Riley that the land contained 160 acres, and having walked about the land, which was bushy, and been led to doubt that quantity being in it, he particularly asked Riley again about the quantity and was assured by him that he could depend upon the land containing that quantity; that he read the Calgary and Edmonton Land Company's agreement, noticing the fact that it mentioned a fraction of an acre, and, becoming satisfied that the land did comprise 160 acres, agreed to buy, on the express understanding talked of between him and Riley that he was paying $8 an acre, though in the final adjustment of the figures a slight difference may have resulted, and that the price was figured out at their conferences on this basis.

The following correspondence between Riley and Jones was put in:—

May 27th, 1905.

Re portion of N. ½ of sect. 33 south of High River.

I am the owner of the above portion of land about 2 miles up the river, west from High River, but I will sell it

for $1,200 clear to me. I understand that there is considerable good land in this property, and that the shelter is worth money. If you can sell it for this price, kindly do so.

I would take $500 to buy my equity in the property. I have sold my section at Cayley to Mr. Wickens of that place.

Yours truly,
Clifford Jones.

D. Riley, Esq.,
High River.

High River, 9

C. T. Jones, Calgary.

Is your quarter of thirty-three for sale? What price?

D. E. Riley.

Calgary, Sept. 11, 1905.

D. E. Riley, High River.

Price thirteen hundred. Commission above.

Clifford Jones.

High River, Alta., Sept. 22nd, 1905.

Clifford T. Jones,

Dear Sir,—I have an offer for s. part of 33, namely, $100 cash and balance of your equity $526.66 in two months. If these terms are satisfactory to you, I can sell under an agreement of sale and give assignments of C. & E. agreement on payment of the balance on 22nd November. If this is satisfactory to you, please send power of attorney to me to-night and I will close it up.

Yours truly,
D. E. Riley.

September 22nd, 1905.

Re south part sec. 33.

I am in receipt of yours of the 22nd instant.

I am willing to accept your offer for this land, provided the full $100 is sent to me now.

I enclose you herewith two copies of agreement for sale, signed by myself. You can fill it out in accordance with the proper terms and give the purchaser one copy and return the other to me.

Yours truly,
Clifford Jones.

D. B. Riley, Esq.,
High River, Alta.

High River, Alta., Sept. 23rd, 1905.

Clifford Jones, Esq.,

Dear Sir,—The party with whom I have been negotiating a sale of your land now wants to have the time for the payment of the balance due you extended to March 15th. He would be willing to pay you 6 per cent. interest.

Kindly let me know whether this arrangement will suit you or not.

The terms he wants are these: $100 cash, and $526.66 with interest at 6 per cent. on or before March 15th.

You to give him an assignment of the C. & E. agreement on payment of the above sum.

I had the agreements of sale filled out on the terms he had agreed to, but when he called to-day to sign them he wanted the time extended. However, the form you sent me can be changed if you will accept his terms.

Yours truly,

D. E. Riley.

Sept. 25th, 1905.

Re Section 33.

Dear Sir:—

I am in receipt of yours of the 22nd inst.

I am willing to sell the land on the terms you mention, provided the purchaser will sign two notes, one a renewal of the other, and will pay the bank interest on them, which will be 8 per cent.

I enclose you herewith 2 blank notes on the Molsons Bank.

I am to pay you $25.00 commission out of this price, but is to be understood that you will wait until the final payment.

Yours truly,

D. E. Riley, High River. Clifford Jones.

High River, Alta., Sept. 28, 1905.

Clifford Jones, Esq.,

Dear Sir,—In regard to your land, the purchaser is willing to give his note for balance due for 3 months and $100 cash. His money will be here in 10 days or sooner, and the papers will be made out and forwarded to you as soon as it arrives.

Hoping this will be satisfactory.

I am, yours truly,

D. E. Riley.

P.S.—Your note for $25 in three months will be satisfactory as to commission.

D. E. R.

High River, Alta., March 22, 1906.

Clifford Jones, Esq.,

Dear Sir,—I am to-day in receipt of a letter from H. de Clerval enclosing an express money order for $11.20, the balance due you on land. Kindly send me agreement (C. & E.) and assignment, as Mr. Clerval wishes me to make the next payment for him. Yours truly,

D. E. Riley.

Riley was examined as a witness, but appeared to have no recollection of what took place between the plaintiff and himself, beyond the fact that he induced the plaintiff to pay him a commission in addition to $25 paid him by the defendant. I am satisfied of the entire credibility of the plantiff. It will be noticed that the price eventually agreed upon between Riley and the plaintiff does not exactly, although it very closely does, represent either $8 an acre proposed by the plaintiff or $1,300 proposed by the defendant. The land was shewn in fact to comprise only 97 acres, leaving a difference of $63.86 acres. On these facts each party claims to be entitled to judgment. I have examined a great number of cases in addition to those cited by counsel; but I find it more convenient, in giving reasons for the conclusion to which I have come, to refer chiefly to text-books. It is stated in Dart on Vendors and Purchasers, 7th ed., pp. 675-6, that "the purchaser will be entitled to compensation for a deficiency in quantity, even though the estate is not sold professedly by measurement; and, though of course he could not claim compensation if it appeared that he contracted with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the property, or even being the occupying tenant . . . The above rule, where the estate is professedly bought by the acre, or (which is the same thing) where the quantity is stated, and there is nothing to rebut the ordinary presumption of price having been fixed with reference to quantity, may, it is conceived, be strictly enforced, where no words are introduced to qualify the statement as to quantity. The qualifying expressions 'by estimation' and 'be the same more or less'

are, however, in very general use; and the cases do not seem to define their precise effect."

Speaking generally, such qualifying expressions, in my opinion, can be taken to meet the case only of a deficiency to the extent of a comparatively small proportion of the stated quantity, and certainly cannot be taken to cover a deficiency of 63 acres out of 160.

The view of the law as above stated was not, as I understand, seriously controverted by the defendant's counsel. He, however, urged that the contract in question is an executed contract, and that therefore compensation cannot now be ordered.

It is a fact that on 23rd March, 1906, the defendant executed an assignment to the plaintiff of the Calgary and Edmonton Land Company's agreement.

I should say here that the plaintiff had come from France shortly before he purchased, and returned to France in the following October; that it was from France that he sent the money to pay the $526.66 and interest owing to the defendant; and that he did not return to High River until June, 1906; and that it was only after his return to High River that he ascertained that the deficiency was in fact very large; that the defendant was away during July and August, 1906, and again from March to September, 1907; and that it was admitted that proceedings had been delayed on these accounts, and that therefore the plaintiff was not chargeable with delay in bringing his action.

In Story's Eq. Jur., 2nd Eng. ed. (1892), sec. 141a, it is said: "The subject as to how far a mistake or misdescription of property sold, after conveyance of the property, would afford ground to the purchaser to claim damages for the mistake or misdescription, has given rise to a most extraordinary divergence of judicial decision, but in the late case of Jolliffe v. Baker, 11 Q. B. D. 255, where all the cases are cited and examined, it was laid down that, in the absence of fraud or the breach of some contract or warranty contained in the conveyance, no action after conveyance would lie by the purchaser against the vendor for misrepresentation. The law as laid down by Mr. Dart in his Vendors and Purchasers, ch. 14, sec. 5, viz., 'With few exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in

respect of defects either in the title to or quantity or quality of the estate, which are not covered by the vendor's covenants,' was cited and approved."

The above citation from Dart appears in 11 Q. B. D. at p. 267, and then Watkin Williams, J., proceeds as follows: "And in sec. 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of actual falsehood and fraud on the part of the vendor entitling the purchaser to a rescission of the contract, or where there is a total absence of the subject matter of the intended contract, and he expressly says (7th ed., p. 812), that a 'bill filed after conveyance simply for compensation in respect of defects will be dismissed.'"

I find also a decision of the Supreme Court of Canada of which there is a note in Cassels's Digest, p. 777, Penrose v. Knight, in which it was held that "after a contract has been perfected by conveyance a bill for compensation on account of defects cannot be maintained, that after the conveyance the purchaser is confined to his remedy upon the covenants, or, in a proper case, where he applies promptly, to a rescission of the contract."

The passage quoted as from Dart ch. 14, sec. 5, I do not find in the last edition. What I take to be the corresponding and substituted passage appears on p. 808, and I infer that there is an intention to withdraw the proposition that, in the absence of fraud, "a total absence of the subject matter of the intended contract" is necessary in order to entitle to rescission. It is now stated that "mutual mistake may be a good ground for rescission after conveyance, though there is neither fraud nor a total failure of consideration: but it seems that it will require a very strong case to induce the Court to exercise its jurisdiction on this ground: such mistake must be one relating to the substance of what was purchased:" Story's Eq. Jur., 2nd Eng. ed., secs. 142-3-4, appears to be to the same effect.

Where there is a mutual mistake, going not necessarily to an essential but to a material, substantial, and important element of the contract, it seems to me that the Court will ordinarily order rescission, even though the contract has been completely executed, if it can do so on equitable terms.

In the present case I am satisfied that both the plaintiff and Riley, the defendant's agent, were convinced that the

land in question comprised approximately at least 160 acres (i.e., they were mutually mistaken as to the quantity), and that, had the plaintiff been aware of the actual deficiency, he would not have entered into the contract. I think that the deficiency being so great it is so material, substantial, and important that the plaintiff is entitled to relief. It is not, however, a case for specific performance; nor, in view of the decision of the Supreme Court of Canada in Penrose v. Knight (supra), can I order payment of a sum by way of compensation. I think justice will be best achieved by ordering that the contract be rescinded, the defendant repaying to the plaintiff within a limited time, which I will fix on the settlement of the minutes of judgment, the amount he has received on account of purchase money, with interest, together with the value of the permanent improvements made by the plaintiff (these sums to be ascertained by the clerk of the Court), with the option, however, to the defendant of paying to the plaintiff, by way of compensation for the deficiency, the sum of $504, being the price of 63 acres at $8 per acre. I give the defendant one month from this date, or, in the event of there being no appeal from this decision, one month from the determination of the appeal, within which to elect which remedy he will submit to.

I give no costs, inasmuch as, in the view I take of the case, the plaintiff is not entitled to the remedy which he claimed, and has alleged fraud, of which there is not the slightest suspicion. I have grounded my decison on mutual mistake. I am, however, not at all sure that the Court may not properly rescind an executed as well as an executory contract, for innocent misrepresentation; but the decisions even of the highest Courts are in confusion.

Reference on some of the points touched on may especially be made to the following: Debenham v. Sawbridge, [1901] 2 Ch. 98; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 393, 416; Pollock on Contracts, 7th ed., p. 545 et seq., discussing Wilde v. Gibson, 1 H. L. Cas. 608; Jolliffe v. Baker (supra).

ALBERTA.

STUART, J. APRIL 22ND, 1908.

CHAMBERS.

TAVENDER v. EDWARDS.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments—Default after First Payment—Inability of Purchaser to Complete—Cancellation of Contract—Return of Money Paid—Instalment not Forfeitable as Deposit—Deduction of Vendor's Damages for Loss of Sale—Depreciation of Property—Purchaser in Possession—Deduction for Occupation Rent and Costs—Land Titles Act—Caveat—Discharge.

Originating summons under sec. 91 of the Land Titles Act for the discharge of a caveat and a declaration of cancellation of an agreement respecting land.

A. E. Millican, for plaintiff.

C. F. Adams, for defendants.

STUART, J.:—This was an originating summons under sec. 91 of the Land Titles Act, whereby the plaintiff, the owner of certain lots in the city of Calgary, which had been agreed to be sold to the defendants, asks that a caveat filed by defendants be discharged and the agreement be declared cancelled and the money paid thereon forfeited to the plaintiff, upon the ground that after the first payment no further instalment of the purchase price had been met, and that several instalments are now overdue and unpaid.

Counsel appeared for the defendants on the return of the summons, and admitted the default alleged, and also that the defendants were not prepared to keep up the payments, but submitted that the first payment could not be treated as a deposit and therefore forfeitable, but should be treated the same as any other instalment.

It was agreed that, notwithstanding the form of the proceedings, all matters involved in the case should be dealt with, and the matter was adjourned for a day to allow of the production of witnesses to give oral testimony upon the question of damages.

Upon the argument the question was raised by the plaintiff whether the first payment of $500 should not be considered in the nature of a deposit, and whether, therefore, being a security or guarantee of good faith, it should not be forfeited according to the rule in Howe v. Smith. The question seems to be largely one of the intention of the parties, and I can find nothing in the agreement which would indicate that the cash payment was intended to be looked upon as in any way different from the other succeeding payments. The question has not yet come up on appeal in this Court; but there have been several individual decisions by members of the Court, and I think it is fairly well settled now that in the case of a purchase and sale agreement where purchase money is payable by instalments and a cash payment is made and referred to in the agreement, that payment is not to be looked upon as a deposit, and therefore forfeitable, unless there is something specifically stated in the agreement to that effect.

The plaintiff is, therefore, entitled to retain only such portion of the cash payment as will compensate him for any damage he may have actually suffered in consequence of the breach by the defendants. It is contended that the property has depreciated in value to the extent of $500, but I hardly think the evidence supports that view. The assistant city assessor was called, and stated that, in his opinion, there had been no depreciation in the neighbourhood where the lots are. The plaintiff says that he has listed the property for sale at $4,000, while the purchase price named in the agreement, which was dated 30th August, 1907, is $4,200. In view of the fact that the sale was made on exceedingly easy terms, viz., in monthly instalments of $40 a month, I rather think the very highest price was secured that could be hoped for, and that the property is now worth somewhat less than the price agreed upon. The question is not exactly whether the property has depreciated in value, but whether it is now worth less than the contract price. The evidence of the assessor shews that it is worth something less; and, as the plaintiff is asking $4,000, I think that is a fair basis to decide upon. I will allow therefore $200 for diminution in value. The plaintiff is also entitled to either interest on the purchase money or a fair rental for the house, which has been in the defendants' possession, or possibly both. I scarcely understand, however, how both could be allowed. He is

entitled to be compensated by way of damage for not having enjoyed the use either of the property or the money; but, as the one represents the other, he surely ought not to get both. I will allow rental at $35 a month during the time the defendants have been in possession of the property. This period can easily be fixed by agreement, but there will be a reference, if necessary, to decide upon it, as I do not appear to have any note of evidence on that point, although it was certainly stated that the defendants had been in possession for a time. The other smaller items of water rates and insurance may, I think, be disregarded. The plaintiff is, I think, entitled to tax his costs against the defendants. Upon the repayment by the plaintiff to the defendants of the balance, if any, of the $500 remaining in his hands after deducting these allowances, the plaintiff may have an order vacating the caveat and for possession.

ALBERTA.

BECK, J. MAY 6TH, 1908.

TRIAL.

MOODIE v. YOUNG.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments—Default—Forfeiture of Amounts Paid—Time of Essence—Resale—Express Agreement—Invalidity—Notice of Intention to Resell—Relief against Forfeiture—Specific Performance—Repayment of Moneys Paid—Liability of Vendor to Purchaser on Resale.

Action by vendor for rescission of a contract for the sale and purchase of land, on the ground of the purchaser's default in payment of instalments of the purchase money, and for forfeiture of the instalments paid. Counterclaim for specific performance or for return of the money paid.

S. L. Jones, for plaintiff.

C. F. Adams, for defendant.

BECK, J.:—The plaintiff, as the vendor named in an agreement dated 24th January, 1907, for the sale of two lots

in Calgary, sues the purchaser named therein, asking for a declaration that the agreement is null and void, and that the moneys paid thereon, namely $750, are absolutely forfeited. The defendant counterclaims for specific performance, or, in the alternative, for repayment to him of the $750. The agreement contains a clause in the following words: "Time is to be considered the essence of this agreement, and, unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and all moneys paid hereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and re-sell the said land, together with all buildings thereon, after giving 20 days' notice to the purchaser, and purchaser covenants not to remove any buildings whatsoever that may be erected on said land."

For the reasons given by me in Great West Lumber Co. v. Wilkins, 7 W. L. R. 166, I hold that the foregoing clause is void in its entirety. Even if it be good to the extent of authorizing a re-sale, I find as a fact that the plaintiff has not proved that any proper and sufficient notice, in accordance with the clause, was given by him or received by the defendant. While I hold, as I have said, that the clause in question is wholly void, I nevertheless am of opinion that, independently of any express provision, a right of re-sale exists in favour of the vendor under an agreement for sale of lands upon default being made by the purchaser. Noble v. Edwardes, 5 Ch. D. 378, is authority for this, and I should follow it notwithstanding the criticism made upon it by Mr. Williams in his work on Vendors and Purchasers, p. 43. But, for the valid exercise of that right, I hold that a vendor must first give a perfectly distinct notice of his intention to re-sell, and allow the purchaser a reasonable time within which to remedy his default, before he actually makes the re-sale. I think the law in such cases is the same as in the corresponding case between a vendor and purchaser of goods. (See Sale of Goods Ordinance, Con. Ord. 1898 ch. 39, sec. 46, sub-sec. 3). But I find that no notice sufficient for this purpose was either given by the plaintiff or received by the defendant. The plaintiff made a re-sale of the lots to one Pirie for $1,000; but, before the transfer to Pirie was registered, the defendant in this action had registered a caveat, which still continues in force. I think the plaintiff, for the reasons given, has not effectively either rescinded

the contract or exercised any right of re-sale which was vested in him, and I therefore dismiss the action.

I think the defendant on his counterclaim is entitled to judgment either for specific performance of the contract or to recover from the plaintiff the surplus remaining after the defendant has been charged with the original purchase price and interest and credited with the $750 which he paid upon the original contract, and the $1,000, being the selling price on the re-sale made by the plaintiff to Pirie.

I do not think that the defendant is prevented from insisting upon his right to specific performance by reason of his being in default and of the provision in the contract that time is to be of the essence of the agreement. I am of this opinion for two reasons. First, on the facts I think it was not intended between the parties that time should be of the essence of the agreement. The defendant in his defence sets up that there was a distinct agreement on the part of the plaintiff at the time he purchased to the effect that, before the first deferred payment should mature, the plaintiff would re-sell the land, so that the defendant would not be called upon to make either of the deferred payments. I think he failed to prove a distinct and binding agreement to that effect; but I find as a fact that the plaintiff led the defendant to believe that he could without doubt carry this plan into effect. As a matter of law, I think the provision that time should be of the essence of the contract constituted an integral part of the forfeiture clause which I have quoted above, and which I have held to be void in its entirety. If my construction of the agreement in this respect be incorrect, and the words purporting to make time of the essence of the contract are held to apply as a matter of construction to the terms of payment for all purposes, I am of opinion that where the purchase price is payable by instalments such a provision is penal, and, constituting as it would a right of forfeiture, is one from the effects of which the Court ought to relieve a purchaser so as to grant him a proper case specific performance if he has remedied, or offered to remedy, his default with reasonable promptitude.

With regard to the rights of a purchaser of land in default reference may be made to the case of Cornwall v. Henson, [1899] 2 Ch. 710, and for the case of a buyer of goods, where the seller has resold on default, to Benjamin on Sales, 5th ed., pp. 951-5. The defendant, therefore,

will have judgment on his counterclaim for specific performance or repayment on the basis above indicated, as he may elect, and he will have his costs of defence and counterclaim. I may perhaps point out that if the defendant elects to take specific performance the plaintiff will not be liable to Pirie for substantial damages, but only for the expenses incurred by Pirie, inasmuch as he is unable to fulfil his contract with Pirie only by reason of failure of title without fraud.

ALBERTA.

BECK, J. MAY 19TH, 1908.

TRIAL.

REEVES & CO. v. CHASE.

Sale of Goods — Machinery — Express Warranty — Implied Condition as to Fitness for Particular Purpose—Non-fulfilment — Right of Purchaser to Reject — Evidence — Oral Representation by Agent of Vendor—Admissibility—Onus — Right to Reject under Terms of Contract — Reasonable Time—Payment of Expenses—Authority of Decided Case —Supreme Court of North-West Territories.

Action for the price of "one Reeves cross compound traction engine" and one "12 bottom Reeves plough with breaker bottom fins and roller coulters," with accessories.

James Muir, K.C., and C. F. Adams, for plaintiffs.

E. F. Ryan, for defendants.

BECK, J.:—The order for the machinery contains a warranty on the part of the sellers as follows: "The machinery furnished on this order is warranted to be made of good materials, well constructed, and with proper use and management to do as good work as any other of the same size and rated capacity for the same purpose. If inside of 6 days from the day of its first use it shall fail in any respect to fill the warranty, written notice shall be given immediately by the purchaser to the vendor at its home office, Columbus, Indiana, and written notice also to the local agent through whom the same was received,

stating particularly what parts and wherein it fails to fill the warranty, and a reasonable time allowed the vendor to get to the machine with skilled workmen and remedy the defects, if any there be (if it be of such nature that a remedy cannot be suggested by letter), the purchaser to render all necessary and friendly assistance and co-operation in making the machinery a practical success." Then follows a provision for the return of the machinery in case it cannot be found to fill the warranty.

During the argument I suggested that, notwithstanding this express warranty, there was also an implied condition that the machinery was reasonably fit for the particular purpose for which it was required, and this point was to some extent argued by counsel. Such an implied condition is not, in my opinion, inconsistent with the express warranty, and is not therefore negatived thereby: Sale of Goods Ordinance, C. O. 1898 ch. 39, sec. 16, sub-sec 4 (Imp. Act, sec. 14.)

I am of opinion that this is not "the case of the sale of a specified article under its patent or other trade name" so as to exclude the "implied condition as to its fitness for any particular purpose:" Sale of Goods Ordinance, C. O. 1898 ch. 39, sec. 16, sub-sec. 1 (Imp. Act, sec. 14.) The machinery was sold by its ordinary appropriate description, with the manufacturers' name prefixed: New Hamburg Manufacturing Co. v. Shields, 16 Man. L. R. 212.

Chanter v. Hopkins, 4 M. & W. 399, Ollivant v. Bagley, 5 Q. B. 288, and Parsons v. Sexton, 16 L. J. C. P. 181, were cases of the sale of "a specified article" which had been inspected by the buyer before purchasing; and the first and last of these cases were cases of the sale of a patented article.

I think, therefore, the present case comes within the main provision of sub-sec. 1, and not within the proviso, and therefore, as I have said, that there was in addition to the express warranty an implied condition that the engine and ploughs, as constituting an entire implement, were reasonably fit for the purpose for which they were sold, which I find was that of ploughing, in much larger quantites per day, namely, 25 to 30 acres, than could be ploughed by horses, land of the character of the land generally in the neighbourhood in which the defendants' lands were situated, and intersected as the land of the defendant Chase was with laterals from irrigation ditches.

In holding as I do, I may perhaps be differing from the view expressed by the Supreme Court of the North-West Territories en banc in Frost and Wood Co. v. Ebert, 3 W. L. R. 69; but the opinion there expressed was not necessary for the decision, inasmuch as the Court had already decided the case upon another ground. That opinion was based upon what I take to be a mere obiter dictum of Lord Russell in an oral judgment at trial in Gillespie v. Choney, [1896] 2 Q. B. 62, "that (the above quoted proviso) obviously is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles, steam ploughs, or other form of invention which has a known name, and is bought and sold under its known name, patented or otherwise." I am quite sure that Lord Russell did not intend to convey the idea that if one ordered a "steam plough" under its generic name, its ordinary appropriate descriptive name, even though details of description of the particular size, capacity, &c., were also given, the proviso would apply. "Specific article" in the proviso may not necessarily mean an article in esse; but I am convinced that "other trade name" means something ejusdem generis with "patent name," that is, a specific name, known to the trade, and indicating a claim by the manufacturer or seller of some special advantage in the particular kind of article so named over other articles of the same general description. Moreover, I do not consider myself absolutely bound to follow the decisions of that Court. This Court is in no legitimate sense a successor of the Territorial Court. That Court was constituted by different legislative authority, and exercised jurisdiction over a much wider territory. Its decisions are, in my opinion, entitled in this Court to the like respect as is accorded to the Courts of the other provinces of the Dominion.

I have very carefully considered the evidence, in view of the defendants' rights under the express warranty and the implied condition. I think the witnesses on both sides gave their testimony quite honestly, and so it is a question what inferences of fact ought to be drawn on all the questions involved from the whole evidence.

Looking at it from the point of view of the warranty, I am of opinion that the defendants did not allow the plaintiffs' expert a reasonable length of time within which to

make the machine—in the words of the warranty—"a practical success."

Looking at it from the point of view of the implied condition, I am of opinion that the evidence shews that from the time of the delivery of the machinery up to the time of its return by the defendants it was not in such condition as to be reasonably fit for the purpose for which it was purchased. Coming as this machinery did on the railway cars, it was necessarily largely in separate parts. Under these circumstances, at any rate, it seems to me it was the duty of the plaintiffs to set it up so that, as a complete and perfected implement, it would work efficiently, that is, would in and by its actual operation shew that it was reasonably fit for the purpose for which it was bought.

The machinery was operated by the defendant Chase. He had charge of the engine, and was a certificated, and I think a competent, engineer. He was evidently an intelligent and practical farmer. I think those assisting him in the operation of the machinery were also intelligent and practical farmers. They failed to make the machinery in its operation fulfil the purpose for which it was bought, notwithstanding the assistance and advice of Murphy, the plaintiffs' selling agent, and two experts in the plaintiffs' employ. The defendants consequently refused to accept the machinery, and returned it to the place where they received it from the plaintiffs. The defendants had a right to have a reasonable opportunity of examining the machinery for the purpose of ascertaining whether it was in conformity with the contract, and, if it was not, to reject it: Sale of Goods Ordinance, sec. 33 (Imperial Sale of Goods Act, sec. 34).

As already indicated, I find that up to the date of the return of the machinery it was not answering its purpose; whether from not being properly put together, or from defects in construction, or both, does not very clearly appear, and is, I think, immaterial. I think in all probability an expert devoting proper time and attention to it could without much more delay have put the machinery in proper working order, but, as I have held, it was the plaintiffs' duty to do this before delivery, or, if after delivery, before the defendants had rejected it: see Crompton and Knowles Loom Works v. Hoffman, 5 O. L. R. 554, 2 O. W. R. 273. After rejection I suppose they might have done so and again

tendered delivery, when the question of the defendants' right to reject on account of the delay would perhaps have arisen; but this was not attempted.

Parol evidence was given that the plaintiffs' agent who made the sale represented that the machinery would plough 25 to 30 acres a day, being informed at the same time of the general charcter of the defendants' land, which seems to have been of the same general character as the land in a large surrounding neighbourhood, and of the fact of the defendant Chase's land being intersected by laterals. I *think* this evidence was admissible, for the reasons pointed out in Gillespie v. Cheney, [1896] 2 Q. B. 59, and in coming to the conclusion that the implied condition was not fulfilled, I have consequently considered all the parol evidence of the character above indicated. As appears from what I have said, I have come to the conclusion that the defendants are entitled to succeed not upon the express warranty, but upon the implied condition. A clear distinction exists between a warranty and a condition—a distinction which was often overlooked prior to the Sale of Goods Ordinance, but which is there advisedly observed. That Ordinance, sec. 2 (o) (Imperial Act, sec. 2) defines a warranty as "an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

No definition of a "condition" is given in the Ordinance. Chalmers in his Sale of Goods Act, in the notes to sec. 11, says: "The Act throughout, so far as it relates to England, draws a distinction between the terms 'condition' and 'warranty.' This distinction has often been insisted on but seldom observed by Judges and text-writers. As used in the Act, 'condition' is equivalent to the old term 'dependent covenant,' while 'warranty' is equivalent to the old term 'independent covenant.'" Section 13 of the Ordinance (Imperial Act, sec. 11) makes the distinction clear: "Whether the stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract."

In the case of a breach of a warranty, the burden of proof of breach is undoubtedly on the party alleging a breach. In the case of a sale of goods subject to a condition, I think the condition is a condition precedent, the proof of which lies upon the seller.

In Bowes v. Shand, 11 App. Cas. 455, 468, Lord Cairns, L. C., says: "If the construction of the contract be, as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject matter of what is sold. . . . The plaintiff has not launched his case until he has shewn that he has tendered that thing which has been contracted for, and, if he is unable to shew that, he cannot claim any damages for the non-fulfilment of the contract." And see per Lord Blackburn at p. 480; Lewis v. Barre, 14 Man. L. R. 32.

The amount in controversy being large, and the questions of fact and law involved being important, I anticipate an appeal from my decision, and have in that view purposely endeavoured to leave the Court in appeal the fullest liberty to draw from the evidence such inferences as they think ought to be drawn. Judgment will be for the defendants with costs, and proceedings will be stayed till the next sittings of the Court en banc at Calgary.

In the event of the Court en banc holding that the defendants are liable, I venture to add that it seems to me they are entitled under the terms of the contract still to refuse acceptance of the machinery on payment of the freight charges and 10 per cent. of the contract price. The plaintiffs put this as an alternative claim.

The clause I refer to is as follows: "In consideration of the expense incurred by Reeves & Co. in soliciting, investigating, and taking this order, the purchaser promises and agrees to pay all freight charges on said machinery and 10 per cent. of the price above stipulated, in case he should cancel this order or decline to accept said machinery for any reason whatever."

I think—see the provisions of the Ordinance above referred to—that the defendants had a right to a reasonable time to examine and inspect the machinery and within which to accept or reject, and that, within such reasonable time, they have by implication from this clause a right to reject, even without cause, subject to the penalty therein stated.

ALBERTA.

STUART, J. MAY 19TH, 1908.

CHAMBERS.

RE ANDERTON.

Land Titles Act—Application for Registration as Owner in Fee Simple—Continuous Possession for over 12 Years—Statute of Limitations—Positive Title Acquired—Direction for Registration and Issue of Certificate of Title—Evidence of Possession—Affidavits—Starting Point for Statute—Evidence as to State of Title at Commencement of Possession, Necessity for.

Reference by the registrar of the South Alberta Land Registration District, upon an application by Edith Lillian C. Anderton to bring lot 10 on the south side of 24th street west of Fifth avenue, in the town of Macleod, under the Land Titles Act, and to be registered as the owner of an estate in fee simple in that lot.

J. W. Macdonald, Macleod, for the applicant.

STUART, J.:—The applicant claims to have acquired an estate in fee simple by means of continuous possession for over 12 years.

The question referred to me, it will therefore be seen, is an exceedingly important one, and indeed in several respects, I believe, a novel one. It involves an inquiry, first, whether or not a person by mere length of possession can under any circumstances acquire a positive title in fee simple in the lands occupied, as distinguished from a merely impregnable defensive point of vantage, from which he is able to ward off and defeat each possible attack as it arises; secondly, assuming that a person can acquire such a positive title, whether in a case such as the present one, where the lands have not yet been brought under the Land Titles Act, and an application is made for that purpose by the person in possession, the Court should direct the registration of the title so acquired and the issue of a certificate therefor; and thirdly, whether in this particular case the applicant has presented sufficient evidence to justify a finding that she has acquired such a positive title to the land in question.

The first question is, of course, not new, and has been the subject of much discussion in a number of cases since the passing of the Statutes of Limitation. There is, however, no advantage in referring to any cases earlier than the year 1833, because by the statute 3 & 4 Wm. IV. ch. 27, passed in that year, which statute was continued by the statute of 1874, and therefore introduced in the Territories by ch. 31 of the Revised Ordinances of 1898, and particularly by sec. 34 of the statute, an important change was made in the effect to be given to it.

Prior to the passing of that section, the effect of the statute had been merely to bar the remedy but not the right of the legal owner. Section 34 expressly declared that the right of the legal owner should cease to exist as soon as his remedy was barred by the statute, and it was owing to the supposed effect of this section that in a number of cases the person whose length of possession had barred the legal owner, was held to have acquired a positive title in himelf.

In the case of Doe d. Jukes v. Sumner, 14 M. & W. 39, which was an action of ejectment brought by the holder of the legal title against the person in possession, the real point was whether the Act of 1833 was retrospective or not, and whether it applied to a case where the period of limitation had begun to run prior to the passing of the Act. The Court decided that the Act was retrospective, but Parke, B., who delivered the judgment, added, in closing, a short sentence which has been much quoted but which would appear to contain a principle scarcely necessary to the decision. He said: "The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period of 20 years has elapsed."

It will readily be seen on examining the case that Parke, B., there went much further than was necessary to decide the case against the plaintiff; the plaintiff being barred by the statute, it was really unnecessary to inquire what kind of a title the defendant was enjoying. It was sufficient for him in that action that that particular plaintiff could not eject him.

The earlier Irish Case of Scott v. Nixon, 3 D. & War. 388, decided by Lord St. Leonards, has perhaps been still more widely quoted, and the facts make the case much more in point. Premises had been sold under a decree of the Court in order to satisfy a judgment against a deceased

testator, and the question was whether the purchaser could be forced to accept the title. The judgment debtor had made a will making certain dispositions of his property, but the particular property in question had been acquired subsequently to the date of the will, and therefore, as the law then stood, did not pass under it. Certain residuary devisees, being younger sons who took subject to debts, entered into possession of the property as if it had passed to them. Long after the death of the testator, the judgment creditor filed a bill in equity to realize his judgment out of the property, and to this suit the then heir-at-law of the testator, an infant, was made a party. A decree for sale was made, and the property was sold, but the purchaser objected to the title. Lord St. Leonards decided that, as the property was in any case subject to payment of debts, a good equitable title could be made, but he also held that the heir-at-law was barred by the statute, and that a good title by adverse possession under the statute was also made out. He said, p. 405: "The case, then, is reduced to a simple question of law, can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new statute? Under the old statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend that it was quite settled that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title. Then came the new statute, which intended to put the title upon higher, certainly not upon lower, grounds. I have heard nothing to displace the observation which has been made, that that statute does not operate by a mere bar of the remedy, that it does not work so imperfectly, it bars the estate itself; and, if so, where can the right be but in the person whose possession the statute prevents from being interrupted? I am clearly of opinion that, by the effect of the statute, after the proper period of limitation has passed, the legal fee simple is in the party who has been in possession during that period, and that he is competent to convey it to another. It was attempted to bring the case within the fifteenth section, for that, supposing the possession was not adverse at the death of George, the eldest son, as his heiress-at-law was a minor at such period, she would have had 5 years to institute proceedings, from the time she

attained her full age. But there is no saving of minority in this section. My impression is, that, whenever the right is barred by time, a good title can be made; that the party in possession has the legal fee simple; and the purchaser will be bound to take such title."

And again on p. 408 he says: "My opinion, however, is, that the title has been, by the operation of the statute, clothed with the legal estate, and therefore that he is bound to take it."

Here again, however, it will be observed that Lord St. Leonards went somewhat further than was necessary. It was clear that a good equitable title could be made, quite aside from the Statute of Limitations. Besides this, I have been unable after a careful scrutiny of the case to discover an explanation of one point in it which certainly appears rather strange, namely, how possession for the required time by the younger sons, the residuary devisees under the will, and by their representatives, arising out of the mistake as to the effect of the will, though sufficient to bar the heir-at-law of the testator, should be considered as giving a title of any kind to the judgment debtor, the testator, whose property was decreed to be sold. If the possession vested the property in any one, it certainly vested it in those whose length of possession had barred the heir-at-law, that is, the younger sons and their representatives, and not in the testator, who during his lifetime possessed it rightfully under a good title, and whose property alone was being sold. Indeed, it is stated in the report that the infant heir-at-law, who was made a defendant, also claimed to be heir-at-law of one of the possessing devisees. From this it would appear that the very argument used to shew that the purchaser could be given a good title under the statute, would rather prove that he could not be given it, unless indeed by estoppel.

But this does not perhaps detract from the great general value of the principle laid down by Lord St. Leonards, a great real property lawyer, in the passages I have quoted, and which has undoubtedly been adopted and followed in more recent cases. It will be observed, however, that in Scott v. Nixon the holder of the legal title was a party to the suit and was definitely known.

There is a still earlier case also decided by Lord St. Leonards, namely, Incorporated Society v. Richards, 1 D. & W. 280, which may be noticed. The Lord Chancellor

said in that case, p. 289: "There is a marked distinction between the old statutes of limitation and the present one. The former statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act, when the remedy is barred, the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar." But these words are only obiter, because he held on the facts that the time limited had not elapsed. In any case, and as will be seen presently, the expressions quoted have been somewhat criticized in later cases.

Scott v. Nixon, however, is much more valuable than Jukes v. Sumner, because it was not an action of ejectment, where it would have been sufficient simply to defeat the plaintiff's claim, but it was a case where the nature of the title of the person in possession had itself to be considered.

In Tuthill v. Rogers, 6 Ir. Eq. 441, Lord St. Leonards again affirmed the principle laid down in Scott v. Nixon, but this, it will be observed, was again in a case where the holder of the legal estate was known and represented, and where such holder, being the Crown, was barred by a special statute relating to Ireland, which directly vested the estate in the possessor.

In Games v. Bonnor, 33 W. R. 64, 54 L. J. Ch. 517, a title by possession was also forced upon a purchaser. The vendor was a mortgagee in possession. A mistake had been made in regard to the mortgagor's title, and there was a remote possibility of the existence of an outstanding tenant in tail. The case is valuable as shewing what attention should be paid to mere conjecture, and it will be observed that on appeal the case was decided against the purchaser simply on the ground that, at the taking of the evidence in respect to the title, he had not insisted, as it was held he might have done, upon the necessity for further and better evidence upon the point.

Turning now for a moment to the text-writers, there are certain passages which seem to touch the point very closely.

Williams on Vendor and Purchaser says, p. 83: "Here it may be noticed that the Court will compel a purchaser to take a title depending on the Statute of Limitations, that is to say, depending on the extinguishment under that statute of the right and title of some person or persons who are shewn to have been rightfully entitled. But it must not be supposed that this doctrine enables a vendor,

who has been in possession for 12 or even 30 years, to escape the common obligation of shewing forty years' title as proof of a good title. Possession for these periods does not give a good title under the statute as against all the world; it does not bar the rights of remaindermen or reversioners not entitled to possession until the determination of some particular estate. It does not appear, therefore, that a vendor's obligation of shewing a good title can be discharged by proof of 30 or even 40 years' possession by himself alone, without shewing, if the Statute of Limitations be relied on, who were rightfully entitled, and that the vendor's possession has effectually barred their claims."

Dart on Vendors and Purchasers, 7th ed., p. 471, says: "A purchaser can be compelled to accept a title depending on adverse possession, verified like any other fact. The beneficial application of this principle, as between vendors and purchasers, is, however, in the case particularly of missing instruments, materially affected by the difficulty which exists of determining the time when the right of action may have accrued to the supposed adverse claimants." See also p. 472.

In Pollock and Wright on "Possession in the Common Law," at p. 95, it is said: "The dispossessor or his assigns, if the adverse possession has been continuous, acquire from that time what has been called a parliamentary title. Not any statute or rule of law has affirmatively made their estate indefeasible, but the negation of the true owner's right and title, which by the express terms of the Act are 'extinguished' at the determination of the period limited for the exercise of his remedies, has for all practical purposes the same effect."

In Darby and Bosanquet on Limitations, 2nd ed., p. 493: "It has been said that the effect of the statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple. But the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him. A title gained by the operation of the statute is a good title, both in law and equity, and will be forced by the Court on a reluctant purchaser. But proof that a vendor, and those through

whom he claims, have had independent possession of an estate for 12 years, would not, of course, be sufficient to establish a saleable title, without evidence to shew the state of the title at the time such possession commenced."

In the case of Sanders v. Sanders, 19 Ch. D. at p. 379, Jessel, M.R., used the following words: "As I said in In re Allison, when a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired under the statute as good a title as if a conveyance had been made to him can restore the old title."

In the case of In re Cussons Limited, 73 L. J. Ch. 296, which also was a case of a dispute as to title between the vendor and the purchaser, Kekewich, J., held that certain cestuis que trust, who had been in possession of the property for over 12 years, were able to convey a good title to the purchaser, notwithstanding the fact that the legal estate was still outstanding in certain trustees or their representatives.

In the case of Kebbell v. Fairthorne, [1895] 1 Ch. 219, it is stated in the head-note of the report as follows: "The effect of barring the mortgagee's title, is to vest the legal estate in the mortgagor." And, although there is no direct expression to that effect in the judgment of Romer, J., yet some expressions used by him during the argument would indicate that the words quoted from the head-note really represented his view upon the point. I refer also to Doe v. Barnard, 13 Q. B. 952, 18 L. J. Q. B. 308.

In the case of Tichborne v. Weir, 67 L. T. at p. 735, there is a full discussion by the Court of Appeal, consisting of Esher, M.R., and Bowen and Kay, L.JJ., of the question whether the effect of the statute of Wm. IV. is to transfer the estate of the holder of the paper title to the person whose possession has barred him, and it was held that this was not the result which follows from the statute.

The expression used by Lord St. Leonards in Incorporated Society v. Richards, which I have already quoted, was also seriously criticized. It was attempted in that case to make a person who had been in possession for the required time liable upon certain covenants contained in the lease held by the person who had been dispossessed. It was decided that this could not be done, and that the statute did not operate to transfer the estate of the person dispossessed to the person in possession, but that the person in possession acquired a new and independent title of his

own, and there are expressions in the judgments delivered which appear to me to raise considerable doubt as to the real nature of the possessor's title. For instance, Bowen, L.J., says, at p. 737: "Only in one metaphorical sense can the section be said to give a title to land."

The most recent case bearing on the point which I have been able to discover in the case of In re Nisbet and Potts's Contract, [1905] 1 Ch. 391, and in appeal [1906] 1 Ch. 386. This also was a case between a vendor and purchaser, in which the question of possessory title was raised. One of the vendor's predecessors in title had acquired a possessory title under the statute, but it was discovered that the original holder of the paper title, who had purchased under a subdivision and building scheme, and who had become barred by the statute, had given a restrictive covenant as to the user of the property, and the question was whether this covenant did not still operate against the present vendor, although his predecessors in title had, of course, not been parties to the covenant, having obtained title, as I have said, merely by possession. It was held that the restrictive covenants still bound the land, because, as stated by Farwell, J.: "All that the Act extinguishes is the right and title of the person who fails to make an entry or bring an action for the recovery of the land in question. The right to enforce these covenants was not part of his title, nor is such right within the Act at all, for it is obvious that the person entitled to enforce them cannot do so by making any entry or distress or bringing any action to recover land."

This decision was upheld on appeal, and expressions are used by the Judges in appeal which again appear to me to throw some doubt upon the position of the possessor.

Collins, M.R., after quoting sec. 34 of the statute of Wm. IV., says, p. 402: "That is the whole right the squatter acquires, namely, the extinguishment of a title adverse to his own." And Romer, L.J., p. 406, says: "Let me consider what would be the position of a squatter after a 12 years' occupation under the statute. By that occupation he has, no doubt, acquired a statutory title as against the covenantor, or the heirs or assigns of the land of the covenantor, who during those 12 years has or have been so remiss as not to eject him; but he does not thereby of necessity become entitled to hold the land free from the obligation of the negative covenant. That obligation is one existing

against the title of the true owner of the land. The right of the true owner to the land has, no doubt, gone as against the successful squatter, who has acquired a title against him under the statute, but the original equitable right of the covenantee still exists." And again further on he says: "There is a fallacy, as it appears to me, in the argument of the appellant, and I think it is this: the argument seems to assume that the statutory owner becomes, at the end of the statutory period of limitation, in the same position as if he had ousted by statutory title all the prior owners of the estate, so as to destroy all negative covenants validly created by them. That is not so."

There is also a passage in a judgment of Lindley, L.J., sitting in appeal with other Judges in the case of Dalton v. Fitzpatrick, [1897] 2 Ch. 86, which should be noticed. He says on p. 89: "This contention is really based on a misconception of sec. 34 of 3 & 4 Wm. IV. ch. 27, which extinguishes the right and title of the person against whom the statute has run. That section does not confer a statutory title against everybody upon the person in whose favour the statute has run, although it does as against those persons whose rights are barred by the statute."

It will be gathered, I think, from these latter quotations that the English Courts have recently been somewhat inclined to insist upon the pure relativity of the possessor's title, that is, they have carefully avoided the use of such language as was used by Parke, B., and Lord St. Leonards in the earlier cases, and which pointed to the existence of an absolute title in the possessor against all the world, and have carefully qualified their description of the possessor's title by saying that it is good "as against" certain persons who, in the particular cases before them, they have held to have been barred. (As to the original relativity of all ownership, see Pollock and Maitland, History of English Law, 2nd ed., vol. 2, pp. 50 and 77). For instance, in the case last cited, Dalton v. Fitzpatrick, it was held that a person who has been granted an estate for life with remainder over in certain property by a grantor having no title at all, and who enters into possession under the deed, and afterwards acquires a good title by possession against the true owner, does not, however, acquire good title as against the remaindermen under the deed, because he is, in the circumstances, estopped as against them from disputing the validity of the deed.

In the case of Rains v. Buxton, 14 Ch. D. 537, however, the plaintiff was the person in possession, and the action was to restrain the defendants, the holders of the paper title, from interfering with a certain cellar which the plaintiffs had occupied without interruption for more than 12 years. The plaintiffs succeeded, and I think the clear inference to be drawn from the judgment of Fry, J., is that he considered that the plaintiffs had acquired a positive title, for he says, p. 541: "I therefore hold that the plaintiffs are, by virtue of the Statute of Limitations, entitled to that cellar." See also Midland R. W. Co. v. Wright, [1901] 1 Ch. 738.

There are also a number of Canadian cases which appear to me to be very helpful.

In Elliott v. Bulmer, 27 C. P. 222, Gwynne, J., delivering the judgment of the Court, said: "We have no doubt that such possession is precisely that which being continued for 20 years the law intended should divest the true owner of his title, and transfer it to the continuous occupants for 20 years."

In Wishart v. Cook, 15 Gr. 237, Spragge, V.-C., apparently considered that a title by possession could be forced upon the purchaser, although in the particular case the evidence of possession was not sufficient.

The same may be said of the cases of McIntosh v. Rogers, 12 P. R. 389, and Re Boustead and Warwick, 12 O. R. 488.

The case of McConaghy v. Denmark, 4 S. C. R. 609, was an action of trespass quare clausum fregit, for the purpose of trying the title to certain land. One of the pleas of the defendant was a plea of liberum tenementum. An attempt was made to support this plea by evidence of possession for the required time. The defendants failed, but only on the ground that their evidence was defective, and it was assumed throughout that if their evidence had been sufficient, they could have established their plea of a freehold title in the property by mere possession for 20 years, which was the time then limited by statute. Gwynne, J., said, p. 631: "The title thus asserted could only be established by shewing a good paper title, or such a possession for 20 years as under the Statute of Limitations would have the effect, not only of barring the title of the true original owner, but of transferring that title by force of the statute to the defendants."

In Myers v. Ruport, 8 O. L. R. 668, 4 O. W. R. 365, the plaintiff sued for a declaration that he was seised in fee simple of certain land, resting his claim upon possession for more than the statutory period. The trial Judge gave the declaration asked for. The judgment was reversed upon appeal, not upon the ground that such a declaration could not in any case be made, but because the facts were not such as to justify a holding that the title of the real owner had been barred. Maclennan and Maclaren, JJ.A., dissented, and held that the plaintiff was entitled to succeed, and the former Judge in his judgment uses these words, p. 679: "Asher v. Whitlock, L. R. 1 Q. B. 1, determined that the title of a disseisor is, as against the whole world but the true owner, an estate in fee simple, capable of being assigned inter vivos, or transmitted by will, or descent to heirs in case of intestacy." And I think the judgment of Cockburn, C.J., in the case he cites can fairly be said to bear that interpretation. It would follow that if the true owner is clearly shewn to be barred by the statute, then the person in possession has an estate in fee simple absolute.

In Kaulbach v. Cooke, 39 N. S. R. 500, the Supreme Court of Nova Scotia held that a verbal gift of land by a father to his son, accompanied by actual delivery of possession, and followed by a continuous and exclusive possession by the owner extending over a period of 20 years, confers a title upon the owner under the Statute of Limitations, which will be bound by a judgment recovered against him, and will pass to the purchaser at a sheriff's sale, and that the purchaser as plaintiff in the action could recover possession of the land.

In Iredale v. Loudon, 14 O. L. R. 17, 8 O. W. R. 963, Mabee, J., said: "The statute operates to extinguish the paper title of the defendants, and to leave the plaintiff, as against them, entitled to possession; it does not vest in the plaintiff the title formerly held by the defendants, and nothing appears in the statute under which the disseisor acquires anything." And he quotes the passage from Dart, 7th ed., pp. 472 and 473, which I have already noted, and which certainly appears to uphold this view; then he goes on to say: "This same point was dealt with in Gray v. Richford, 2 S. C. R. 431, at p. 454, where the statute was regarded as of extinctive, not of acquisitive prescription, that 'it operates to bar the right of the owner out of possession, not to

confer title upon the trespasser or the disseisor in possession.' Notwithstanding this, there can be no doubt that the person who has been in possession for the statutory period certainly does acquire what is spoken of in conveyancing authorities as a title . . . A declaratory judgment, however, rests in the sound discretion of the Court, and while I think the plaintiff has, by his possession, acquired title, I do not think it is a proper case for the Court to make such a declaration as against the person whose title has been lost, and that the better course is to leave the plaintiff where the statute leaves him." He granted an injunction, therefore, against the defendants without making a declaration as to title. The judgment was reversed on appeal and the action dismissed entirely, but upon grounds which scarcely touch the present point: 10 O. W. R. 725, 15 O. L. R. 286.

In the year 1865 a statute was passed by the legislature of the province of Canada known as the Quieting Titles Act, and, inasmuch as this Act granted no special power to the Court to deal with titles arising from mere possession, but apparently placed the Court in much the same position as a Judge to whom a reference has been made in a doubtful case by the registrar under sec. 30 of our Land Titles Act, it is useful, I think, to refer to a number of Ontario cases decided under that Act.

In the following cases it was held in theory that a good title could be made out under the Statute of Limitations sufficient to justify the Court in issuing a certificate to the person in possession: Re Caverhill, 8 C. L. J. 50: Low v. Morrison, 14 Gr. 192: Re Taylor, 28 Gr. 640; Re Bell, 3 Ch. Ch. 239; although of course in some of the cases the facts were held not sufficient to justify the Court in granting the applicant's petition.

I find also that in the different States of Australia, where the Torrens system prevails, applications are constantly made to bring land under the Act and for the issue of a certificate upon the basis of a mere possessory title, and that such applications are granted and certificates issued not only in those States whose Land Titles Acts contain special clauses dealing with the rights of persons claiming by possession and permitting them to secure registration, but also in those States whose Acts, like our own, do not contain any specific reference to the question.

Hogg, Australian Torrens System, at p. 721, says: "The title of the owner or the applicant to a legal fee simple may be shewn either by muniments of title, or by proof of possession sufficient in length of time to satisfy the requirements of the Limitation Acts." And again on p. 722 he says: "A statutory title gained under the Limitation Acts as against a former owner in fee is a legal, and not an equitable title, though it is possibly not technically an estate in fee simple. For the purposes of the Torrens system such a title is, in practice, treated as the legal fee simple." Again on p. 770 he says: "The relation, in fact, between the rights of a person who has occupied land for the statutory period under a Limitation Act, and the person in whom the legal fee simple is vested by documentary title, is closely analogous to the relation which exists between the statutory fee simple conferred by due registration under the Torrens system, and an outstanding legal estate in fee simple which is not recorded in any way on the register. In each case the owner of the 'legal estate' of the general law has for all practical purposes lost his property in the land; in each case the new owner has statutory rights which are undistinguishable, in point of practical value, from the 'estate' of the former owner, and are cognizable in the Courts as identical with or equivalent to the most complete rights of property allowed by the law—in other words, the new owner has a new estate in fee simple."

This, I think, fairly well exhausts the authorities. The question is, what can be said to be the result of them?

There is no doubt, in the first place, that immense weight should be given to the clearly expressed opinion of Lord St. Leonards in Scott v. Dixon and Incorporated Society v. Richards, even though in the latter case he did use a possibly careless expression as to the transfer of the very estate of the disseisee to the disseisor, which was also used by Gwynne, J., in Elliott v. Bulmer and MacConaghy v. Denmark, and which was definitely repudiated in Tichborne v. Weir. Quite aside from that expression, it is plain that Lord St. Leonards did consider that the disseisor does by virtue of the statute, where the real owner, the holder of the paper title or his representative, is definitely known and is barred by the statute, obtain an estate in fee simple in the land. This is also clearly the opinion of Maclennan and Maclaren, JJ.A., in Myers v. Rupert, and would als

appear to have been really the opinion of the whole Ontario Court of Appeal in that case. The Supreme Court of Canada in McConaghy v. Denmark must also, I think, be taken to have expressed the same opinion, because all the three Judges who delivered judgments used language which clearly points to that conclusion. Strong J., concurred in these judgments, although he had previously, it is true, in Gray v. Richford, used the words cited by Mabee, J., in Iredale v. Loudon.

We have also the practice of the Ontario Courts under the Quieting Titles Act and the practice in the States of Australia under the Land Titles Act, which both proceed upon the assumption that the principle laid down by Lord St. Leonards is correct, and we have also the numerous cases both in Canada and in England which I have referred to where such a title has been forced upon a purchaser.

What is there on the other side? First, it is clear that too much importance must not be attached to such a case as Dalton v. Fitzpatrick and the cases cited therein, because the position there was that a possessor, whose original possession was not confessedly and avowedly wrongful, but who had entered in the belief that a document which purported to give him title was a valid document, could not plead his possession as against other persons who had claims under that same document. The principle of estoppel applied against him. With regard to the case of In re Nisbett and Potts's Contract, the exact decision seems to me to be that the possessor had in fact acquired a "statutory title"—those words, indeed, were actually used by Romer, J.—but that it was subject to an easement or restrictive covenant. Now, that would in no way prevent the possessor's estate from being, after all, an estate in fee simple, though, of course, it might, in an easily conceivable case, make the Court refuse to direct the issue of a certificate of title under our system, which would place future purchasers in a much higher position than the vendor was there held to occupy, inasmuch as the effect would clearly be to destroy the restrictive covenant entirely, on account of its not appearing on the register. This, however, seems to me to affect only the degree of care which should be taken by the Court and the information which it should insist upon before directing the issue of a certificate, rather than to negative the principle laid down in Scott v. Dixon.

On the whole it seems to me that the balance of opinion and of practice is very strongly in favour of the doctrine that a title in fee simple, or what we should consider equivalent thereto, can be acquired, not indeed by virtue of any express words contained in the statute, but as a logical consequence of the effect resulting from its operation, and that we ought to view the various expressions to the contrary which I have quoted as simply examples of how careful the Courts always are to say no more and to go no further than is necessary to decide the particular case before them. And it would seem to me that this must necessarily be the result. In Pollock and Wright, p. 94, it is said: "The standing proof that English law regards, and has always regarded, possession as a substantive root of title, is the standing usage of English lawyers and land-owners. With very few exceptions there is only one way in which an apparent owner of English land who is minded to deal with it can shew his right to do so; and that way is to shew that he, and those through whom he claims, have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim."

Assuming that the real owner, that is, the holder of the paper title, or his representative, is known, and that he is barred, the possessor's title seems to me to become full grown and complete. No one in the world can ever disturb him. He can devise, transfer, mortgage, or otherwise deal with his property as he pleases. I am speaking now, of course, aside from the Land Titles Act, which as yet does not apply to the case. It is true that he may not technically hold that feudal "fee" or "feod" which can strictly originate only in a grant or enfeoffment immediately or mediately by the Crown. But, nevertheless, there he is. What is to become of the land and the title to it? Is it to go on forever as a parcel held by a sort of allodial ownership, and never to be treated as held under a registrable title except by intervention of the legislature? It seems to me that the authorities, the practice in analogous cases, as well as the common sense of the thing, are altogether too strong to permit any other conclusion than that a possessor does by virtue of the consequences of the statute, provided the proper conditions are fulfilled, obtain an estate or interest in the land which ought to be treated exactly as if it had originated in a grant from the Crown, and as if it were a technical estate in fee simple.

This being so, it follows, I think, that the possessor may apply to have his estate registered as an estate in fee simple under the Land Titles Act. Section 27 of the Act says that "the owner of any estate or interest in any land, whether legal or equitable, letters patent for which issued from the Crown before the first day of January, 1887 . . may apply to have his title registered under the provisions of this Act." By sec. 2 (b) the expression "owner" is declared to mean "any person or body corporate entitled to any freehold or other estate or interest in land at law or in equity, in possession, in futurity, or expectancy."

In this case the patent from the Crown issued in June, 1886, and the applicant's case fulfils the necessary preliminary condition contained in sec. 27, and, if the other necessary conditions as to evidence had been fulfilled, I think the applicant would have come clearly within the meaning of the words "the owner of any estate or interest in any land, whether legal or equitable."

It is fortunately not at all necessary to consider in this case the more serious question as to the effect of the Statute of Limitations where the land is already under the Act, though I may point out that the case of Belize Estate Co. v. Quilter, [1897] A. C. 367, would apparently indicate that that statute would still have its effect notwithstanding the Land Titles Acts.

I have dealt at length with the general law first, because, although on the evidence before me I cannot see my way clear as yet to grant the application, still it will, I think, give some satisfaction to the applicant to know that she is not finally precluded from succeeding, but that the way is open to her to secure a registered title, provided proper evidence is adduced.

It appears from the abstract of title that a patent from the Crown was issued to one W. J. Wilson on 4th June, 1886, and was filed in the registry office on 2nd October, 1886, but no certificate of title was ever issued. The only other instrument appearing from the abstract to have ever been registered in respect of the lot in question is a deed dated 17th September, 1886, and appearing from the affidavit to have been duly executed, whereby Wilson conveyed the lot to one Arthur W. Draper. This deed was also registered on 2nd October, 1886. It also appears that one Samuel D. Smith obtained a judgment against Draper, and under this judgment issued a writ of execution against

lands for $662.01, and that this writ was duly registered on 9th March, 1907. The applicant in the affidavits which she first produced states that in the year 1893 she purchased the lot in question from one Charles G. Smith, that the said Smith represented to her that he was the owner of an estate in fee simple in the said lot, that he could give a good transfer for the same, that the said Smith had never furnished her with such a transfer, that immediately upon purchasing the lot she entered into possession of the same, erected a fence around it, enclosing, however, within the same fence also an adjoining lot, upon which latter lot she erected a dwelling-house, that since the year 1893 she has remained continually in possession of the said lot without any interruption whatever, and without any adverse claim having been made against her in respect to the use or occupation thereof, that the said lot has been assessed against her by the town of Macleod ever since she entered into possession, and that she has annually paid the taxes levied thereon, that she has never heard of, and does not now know of any claim to the said lot adverse to her own, that the purchase from Smith was made verbally, and that she paid him the consideration agreed upon, and finally that she has no documents in her possession relating to the said lot except the affidavits and the official certificates necessary to be produced upon the application.

Charles G. Smith in his affidavit confirms the statements of the applicant in regard to the sale by him to her, and states that the reason he did not give a transfer was that he did not himself have title, that he had bought the lot from one H. R. Wilson in 1887, and that the said H. R. Wilson had promised to give him a transfer, but had failed to do so, that the said H. R. Wilson had died at the town of Macleod in the year 1890, unmarried, and, so far as the deponent knows, without relatives living; that he, the deponent, has now no claim to the said lot; and that he does not know of any other person except the applicant who has any claim or interest in it.

I directed notice of the application to be served upon Draper and upon Samuel G. Smith, his execution creditor, and also to be published in 4 successive weekly issues of a newspaper published in Macleod. The publication in the newspaper appears to have been properly made, as also the service upon Draper. The service on Smith, the execution creditor, however, was not made until a week after the date

first fixed for the hearing, but, owing to the numerous adjournments that have taken place, and also to the fact that Mr. McNeil, who is his solicitor on the record, accepted service of the notice in his behalf, and was aware of the dates of the adjournment, I think Smith may be treated as having been properly notified. Mr. McNeil at first appeared on the return of the notice on behalf of Draper, but upon the final hearing of the application no one appeared except the solicitor for the applicant, Mr. Macdonald, and no evidence was tendered in contradiction of the statements made in the affidavits to which I have referred.

In Re Caverhill, 8 C. L. J. 50, which was an application under the Ontario Quieting Titles Act, Mowat, V.-C., said: "To make out a title by prescription where the proceeding is ex parte, the evidence should be clear, strong, and satisfactory. It should be by more than one independent witness, and should shew that the possession was of the whole lot . . . Unless the evidence for this purpose is clear, it should be given viva voce and before a Judge. But the testimony of a single witness in the loose and general terms of Crawford's affidavit would never do."

It was in view of this opinion, and of similar expressions in some of the other cases which I have already cited, which all appear to me to be reasonable, that I asked the applicant's solicitor to furnish me with further evidence of independent witnesses on the point of possession and occupation, and I have now before me the affidavits of John Ryan and of Alfred F. Grady, two of the oldest and most respectable citizens of the town of Macleod. The former swears that he has lived in that town from 1893 to 1903, that he is well acquainted with the applicant, and has known her since 1892, that he is familiar with the lot in question, and that he knows that the applicant had erected a fence around the lot together with the adjoining lot some time before the year 1894, that to his personal knowledge the applicant has been in possession of the lot since before the year 1894, that he has never heard of any person claiming title to the said lot adverse to the applicant, and that he has assisted his personal recollection of these facts by consulting records which he had procured as assessor, and which are still in his possession.

The deponent Grady swears that he has lived in that town since the year 1885, and that he was a member of the town council in the year 1894, and was mayor during the

years 1895, 1896, and 1897, that he has been well acquainted with the applicant since the year 1894, that he is familiar with the lot in question, and that he knows that before he took office as mayor in the year 1895 the applicant had erected a fence around the lot together with the adjoining lot, that he has lived continuously in Macleod since the said fence was erected, and that the applicant has always been considered the owner of the two lots; that he has never heard of any claim to the said lots or either of them adverse to the applicant, and that he had sold hardware fittings to the applicant to be used in connection with the erection of the said fence.

It seems to me that the testimony of these two witnesses is of such a character as to justify me in accepting it, and in dispensing at my discretion in this particular case with viva voce testimony from the applicant.

It must be taken, I think, as quite sufficiently proven that the applicant has been in possession of the lot since the year 1893, and that her possession has been of such a character as to bar any adverse claimant, provided I were in a position to decide that more than 12 years had elapsed since the right of the true owner to make an entry or to bring an action first arose.

This, however, is the crux of the matter, and it seems to me that the applicant is still in a difficulty.

As was said by Fry, J., in Sands v. Thompson, 22 Ch. D. 617, "Before we can determine the end of the period, we must settle the beginning of the period."

If it had been shewn that the deed of grant from Wilson to Draper of 17th September, 1886, was the last conveyance ever made, and that Draper were still the holder of the documentary title, and that he had never even agreed to sell to any other parties, I think it would be quite clear that he should be considered as the "true owner," in the sense in which that expression is used in the cases, and it would also be clear that as against him the statute began to run when the applicant entered into possession in 1893. In such a case he would clearly be barred by the statute, possible claimant.

If these had been the facts, I think I could, in such a case, have granted the application, but that, unfortunately, is not the situation disclosed by the evidence. It is to be

regretted, I think, that Draper has simply stood mute in the matter, and given the Court no information, because, so far as the evidence goes, it would lead to the supposition that Draper had parted with his interest to some other persons, and that that interest had eventually reached H. R. Wilson, who is said to have died in 1890. It is true that, whatever subsequent claimants there may be, these must necessarily claim through Draper, and it may, therefore, be said that the effect of the first part of sec. 2 of the Statute of Wm. IV. would be to bar all such claimants. This, however, does not necessarily follow, because, as stated by Williams on Vendor and Purchaser, in the passage I have already quoted, it would not "bar the rights of remaindermen or reversioners not entitled to possession until the determination of some particular estate."

How can I assume that there never was any document executed subsequently to the deed of 17th September, 1886, in which rights may have been given to remaindermen or reversioners, who under the document might not be entitled to enter or to sue until long after 1893?

Again, take the case of H. R. Wilson, who, on the applicant's own shewing, was interested in some way, and who died in 1890. Supposing he had died without a will and leaving infant children, their right to make an entry or bring an action might not even yet have arisen, and I do not think that the affidavit of Charles G. Smith is sufficient to prove that H. R. Wilson did not leave such infant children.

Lord Selborne said in Games v. Bonnar, already cited: "That is not the sort of evidence which, except by consent, could be received as proof that Lewis had died as stated. Strictly, his death and burial would have to be proved by certificate, his intestacy by evidence that no will of his was ever proved or heard of, and his never having been married, by evidence of members of his family who would have heard of his marriage if it had ever taken place."

I do not think I am yielding too much to mere vague conjecture in saying that, so far as the evidence before me goes, something may quite easily have happened between 1886 and 1893 which would have for its result that the true owner was a person against whom the statute had not begun to run until within a period of less than 12 years prior to the present date.

I have already quoted the passage from Darby and Bosanquet on Limitations, to the effect that "proof that

a vendor, and those through whom he claims, have had independent possession of an estate for 12 years, would not, of course, be sufficient to establish a saleable title, without evidence to shew the state of the title at the time such possession commenced."

There is no evidence to shew the state of the title in 1893, and I think the applicant should be asked to make a further effort to give the Court information on that point.

It is true that in the case of In re Jolly, [1900] 2 Ch. 616, Collins, L.J., said: "The effect of the statute of Wm. IV. was to do away with non-adverse possession and to make all possession adverse." That, however, only means that the old difference between the sort of wrongful holding which would reduce the interest of the lawful owner to a right capable of being barred by the Statute of Limitations, and that species of unwarrantable possession which was accompanied by no such consequences (a difference as to which Lord Mansfield said "the more we read, the more we shall be confounded"), was done away with, and destroyed by the statute of Wm. IV. (see Sm. L. C., 11th ed., p. 649).

It does not, however, mean that it is no longer necessary to discover a starting point from which the statute begins to run against the true owner. It is impossible to say that the statute began to run in this case against the true owner in 1893, until we know how the title stood at that date. It is this point, therefore, I think the applicant must be asked to clear up, if at all possible.

I may say that if the reluctance of Draper to appear and say what he knows arises from any fear that he will be saddled with costs, he need have no such anxiety, because, even if he were to appear and claim under the deed from Wilson and contest the applicant's petition vigorously, and the applicant were to succeed nevertheless, the cases shew that he, being the holder of the only documentary title appearing to exist, would be entitled to rest upon that, and to say that, before it is destroyed, the applicant should prove her case and at her own cost.

If the applicant fails to secure any further information, and is of opinion that I am wrong, and that the evidence is sufficient to justify the Court in ordering the registration of her title, I shall of course be quite ready to grant leave to appeal if that is necessary.

ALBERTA.

BECK, J. MAY 20TH, 1908.

SINGLE COURT.

MERRIAM v. PARISH.

Vendor and Purchaser—Contract for Sale of Land—Purchase Money Payable by Instalments — Default — Provision in Contract for Rescission of Agreement and Forfeiture—Void Clause—Remedy—Specific Performance or Sale in Default —Practice—Judgment — Default of Appearance—Judgment in Accordance with Statement of Claim—Notice of Motion—Service by Posting in Office of Clerk of Court—Relief other than as Claimed.

Motion by the defendant to set aside a judgment for the plaintiff (vendor) in an action for rescission of an agreement for the sale and purchase of land and for other relief.

C. A. Grant, for defendant.

J. K. Macdonald, for plaintiff.

BECK, J.:—The statement of claim alleges that the agreement contains a provision in the following terms:—

"And it is further expressly agreed that if the said purchaser, his heirs, executors, administrators, or assigns, fail to make the payments aforesaid, or any of them, within the above times limited, or fail to carry out in their entirety the conditions and stipulations of this agreement, in the manner and within the times before mentioned, the times of payment as aforesaid, as well as the strict performance of each and every of the said other conditions and stipulations being a condition precedent and of the essence of this agreement, then the said vendor, his heirs, executors, administrators, and assigns, shall have the right to declare this agreement null and void as fully and completely as if these presents had never been executed, by written notice to that effect personally served on the said purchaser, his heirs, executors, administrators, or assigns, or mailed in a registered letter addressed to him or them, as the case may be, at the Edmonton post office; and all the rights and interests hereby created or then existing in favour of the said purchaser, his heirs, executors, administrators, or assigns, or derived under this contract, shall thereupon cease

and determine, and the premises hereby agreed to be sold shall revert or revest without any further declaration of forfeiture or notice, or act of re-entry, and without any other act by the vendor to be performed, or any suit or legal proceeding to be brought or taken, and without any right on the part of the said purchaser, his heirs, executors, administrators, or assigns, to any reclamation or compensation for moneys paid thereon."

The statement of claim then alleges default and a notice in pursuance of the clause declaring the agreement null and void, and claims a declaration that it is void and all interest in the land and the moneys paid forfeited.

The defendant did not appear. The solicitor for the plaintiff some time ago applied to me ex parte for judgment in the terms of the relief claimed. I refused this, on the ground that, in my opinion, the "forfeiture clause" was void, and that his claim for relief was merely for a declaration that the plaintiff had effectively cancelled the agreement and was entitled to retain all payments made on account of purchase money. I also declined to give the plaintiff any other relief, inasmuch as, though had the defendant been represented on the motion I could have given judgment for any relief to which the plaintiff appeared entitled, I could not do so in his absence. At the same time I suggested that he might perhaps be entitled to other relief, justified by the allegations of the statement of claim, if he gave notice of motion specifically indicating the terms of the judgment he would ask. This clause, as will be seen, is, if effective, much more drastic than the clause which in Great West Lumber Co. v. Wilkins, 7 W. L. R. 166, I held to be void. Notwithstanding the decisions in Labelle v. O'Connor, 11 O. W. R. 95, 15 O. L. R. 59, and Steele v. McCarthy, 6 W. L. R. 396, 7 W. L R. 902, I still feel quite convinced of the correctness of my own decision, and, with due respect to the learned Judges who take a contrary view, I must adhere to that decision until, if it should so happen, I shall be overruled by a Court whose decision is binding upon me.

The plaintiff's solicitor adopted my suggestion, and gave notice of motion (not however personally, but merely by posting up the notice in the clerk's office) to the effect that he would at the time stated in his notice move for judgment, (1) as claimed in the statement of claim, or alternatively, (2) for specific performance and in default rescission, or alternatively (3) for sale and, in default, rescission

If I was right in my opinion that the plaintiff was not entitled to the relief specifically claimed by his statement of claim, I was undoubtedly right in declining to give the plaintiff judgment for any other form of relief in the absence of the defendant: Tacon v. National Standard Investment Co., 56 L. T. 165; Faithfull v. Woodley, 43 Ch. D. 287.

On the return of the notice of motion so served, I made an order for payment by the defendant of the balance of purchase money and interest within one month, and ordered that in default the agreement be cancelled and the payments made on account of purchase money be forfeited to the plaintiff; but directed this order to be personally served.

The defendant moved against this order.

I am now of opinion that the plaintiff could not increase the extent of the relief to which he might be entitled by a notice of motion served merely by posting it up in the clerk's office: Gee v. Bell, 35 Ch. D. 160; Law v. Philby, 35 W. R. 401, 450; Annual Practice, 1908, p. 347; though I think it would be otherwise if the notice were personally served.

As the defendant is now before me, I think I am at liberty to make such order as the plaintiff appears to be entitled to upon the allegations in his statement of claim, and the evidence stated in the affidavits before me upon this motion, independently of the terms of the claim for relief in the statement of claim.

In an action by a vendor against a purchaser on an executory contract for the purchase of land, I think the plaintiff may, where he is not merely seeking a declaration that he has effectively exercised a legally binding express provision for rescission, or a legally binding express provision or the implied provision for resale (Noble v. Edwards, 5 Ch. D. 378, Moodie v. Young, decided by me at Calgary, 6th May, 1908, ante 310), claim (1) damages, (2) specific performance, (3) rescission (Mackreth v. Marlar, 1 Cox 259, 29 E. R. 1156, Lysaght v. Edwards, 2 Ch. D. at p. 506, West v. Lynch, 5 Man. L. R. 167), (4) sale to realize his vendor's lien (Pomeroy's Equity Jurisprudence, 3rd ed., secs. 1260, 1261.)

The plaintiff does not by his notice of motion claim rescission as a substantive form of relief, but only in default of sale. I am not inclined to give rescission, in view of the fact that the price of the land (the date of sale being 16th March, 1907), was $1,080, upon which the defendant

paid the large proportion of $450, leaving a balance of principal of $630. The plaintiff is not entitled to succeed without shewing either now or on a reference that he has a good title. To save expense, if he produces to me a registrar's abstract of title shewing a good title, he may take a judgment either for specific performance or for sale. In either case the time limited for payment by the defendant will be one month from the actual issue of the formal order.

SASKATCHEWAN.

JOHNSTONE, J. MAY 19TH, 1908.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. LEIER.

Costs—Right to—Mortgagees' Costs—Correspondence and Attendances—Discretion—Taxation.

Motion by plaintiffs to review the taxation of the registrar at Regina of the plaintiffs' bill of costs. On the taxation the registrar disallowed certain correspondence between the plaintiffs (mortgagees) and their solicitors, and the solicitors of the plaintiffs and the defendants, and between the solicitors for the plaintiffs and the Regina agents of such solicitors, and for attendances on the defendant Leier in regard to an offer of settlement, and correspondence resulting therefrom, together with enlargements of the originating summons then pending.

T. D. Brown, Regina, for plaintiffs.

T. S. McMorran, Regina, for defendants the Massey-Harris Co.

JOHNSTONE, J.:—I find that the mortgage in question contains the following provision: "And it is hereby agreed that the mortgagees may pay any liens, etc., and the amount so paid, together with all costs, charges, and expenses which may be incurred in completing or repairing the buildings on said lands, or in obtaining and keeping possession of said lands, or in inspecting or managing the same, and in all proceedings taken to realize or protect this security

or to perfect the title to said lands, shall be a charge on the said lands in favour of the mortgagees, and shall be payable forthwith with interest," etc.

In Cotterell v. Stratton, L. R. 8 Ch. 295, Lord Selborne at p. 302 laid down the following principle: "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption . . These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of the trustees."

The same principle is laid down in Turner v. Hancock, 20 Ch. D. 304. At p. 306, Jessel, M.R., says that the words of Order LV., which is similar to our Rule 517, which is, "Costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts and compensation or allowance to any executor, administrator, guardian, committee, receiver, or trustee, shall be in the discretion of the Court or Judge," do not include the costs of a mortgagee or trustee, which are not to be in the discretion of the Court. Lord Justice Cotton at the same page, referring to sec. 49 of the Judicature Act, 1873 (a section somewhat similar to our Rule 500, which says, "no judgment given or order made by the Court or a Judge by the consent of the parties, or as to costs only which by law are left to the discretion of the Court or Judge, shall be subject to any appeal except by leave of the Court or Judge giving the judgment or making the order"), goes on to say: "There is no doubt that the Court has power to deprive a trustee of his costs, but it only does so if something has occurred

to deprive the trustee of his right to take them out of the fund, which is part of the contract under which he undertakes the trust. It has been attempted to confine that right to costs which are not costs of litigation; but Cotterell v. Stratton directly applies on this point. In that case a mortgagee was deprived by the Vice-Chancellor of his costs of the suit, and an appeal was allowed, shewing that the rule applied not only to costs incurred without litigation, but also to the costs of a suit . . a trustee and a mortgagee being put upon the same footing in this respect . . both kinds of costs being in fact a matter of contract. Under these circumstances, I think it is clear that a trustee's costs cannot be said to be within the discretion of the Court, and are excepted out of the section of the Act which I have read."

The doctrine above laid down was followed in National Provincial Bank of England v. Games, 31 Ch. D. 582. In this case the mortgage had been taken by the plaintiffs, and a promissory note from one Miss Games taken as a further security to the mortgage, and the costs of correspondence with the mortgagor and between the mortgagee and the surety had been disallowed by the taxing Master. On appeal Lord Justice Fry, at p. 595, said: "A mortgagee is a creditor; he has also a security for the debt; and, whether he is trying to get his money from the mortgagor or from a surety, or out of the mortgaged property, he is trying to enforce his rights as a mortgagee, and the costs of the correspondence with the surety must be allowed. The costs of the correspondence with the mortgagor are even more clearly relative to the position of the plaintiffs as mortgagees."

These authorities clearly shew that the costs in question herein were not within the rule as to discretion, but that the plaintiff was entitled to have the same taxed to him in the cause, for the reasons given.

I think, therefore, the registrar should have taxed to the plaintiffs the items the subject of review, and there will be a reference back to him with a direction to allow such items. The costs of the application to be costs to the plaintiffs in the matter.

SASKATCHEWAN.

JOHNSTONE, J. MAY 21ST, 1908.

TRIAL.

REEVES v. KONSCHUR.

Mortgage—Action for Foreclosure—Land Titles Act—Transfer of Land—Certificate of Title—Memorandum Indorsed on—Merger or Extinguishment of Mortgage Assigned to Transferee—Priority—Covenant.

A mortgage action for foreclosure.

D. Mundell, Moosomin, for plaintiffs.

E. L. Elwood, Moosomin, for defendant Lavinia Riddell.

JOHNSTONE, J.:—This is an action brought by Reeves & Co. against Paul A. Konschur, Lavinia Riddell, Riddell & Co., E. A. Dahlquist, James B. Trumpour, and the De Laval Separator Company (the defendants other than Paul A. Konschur and Lavina Riddell being registered execution creditors of Paul A. Konschur), for foreclosure of the defendants' rights in respect of an indenture of mortgage made by the defendant Konschur to the plaintiffs on 7th July, 1904, to secure the payment of certain promissory notes made by the mortgagor. This mortgage covers the south half of section 22, township 2, range 3, west of the second meridian, in the province of Saskatchewan, and was duly registered against the lands in the land titles office for the Assiniboia land registration district, on 26th July, 1904. All moneys secured by the mortgage became due on 25th November, 1906. The certificate of title to the lands in question issued to the defendant Lavinia Riddell on 10th September, 1906, and the mortgage in question was indorsed as a first charge thereon.

The defendant Lavinia Riddell in her defence sets up that on 8th September, 1904, the defendant Konschur executed to the Mutual Life Insurance Company of Canada a mortgage upon the land mentioned in the statement of

claim for securing repayment to such company of the sum of $2,000 and interest; that on 26th February, 1906, that company commenced proceedings for foreclosure; that on 4th April, 1906, Konschur transferred the said lands to the pleading defendant; and that in the month of April, 1906, she paid to the Mutual Life Insurance Company the sum of $2,460.49, the principal and interest and costs due, and obtained an assignment of their mortgage from that company; that nothing whatever had been paid by the defendant Konschur on account of that mortgage to the Mutual Life Insurance Company, and that there was due on the date of such defence (20th May, 1907), the said sum of $2,460.49 and interest; and that the plaintiffs' mortgage was not a first charge on the land, but that the defendant Lavinia Riddell was entitled to have her mortgage declared a first charge.

The defendant Konschur in his defence denied that there was due and owing by him to the plaintiffs the amount claimed, by reason of the plaintiffs having taken possession of a certain threshing outfit which formed the consideration for the making of the hereinbefore mentioned notes, when it was agreed between the plaintiffs and him that the plaintiffs should take the machinery and credit him with $3,000, the value thereof, on account of his indebtedness.

The plaintiffs, in their reply to the defence of the defendant Lavinia Riddell, joined issue, and as to the defence of the defendant Konschur alleged that under and by virtue of a provision in that behalf contained in a certain order in writing signed by Konschur dated 23rd April, 1904, under which order the said machinery was sold and delivered to the defendant, the plaintiffs seized and sold the machinery at public auction and realized from such sale $2,225, which sum they were willing to credit on the mortgage sued on, together with the further sum of $60.14 realized from the sale of the defendant's crop.

Evidence was given at the trial (which took place before me at Arcola in January), proving the transfer from Konschur to Lavinia Riddell and the payment by her of the moneys secured by the mortgage to the Mutual Life Insurance Company, and of the transfer by that company to the defendant Lavinia Riddell on the dates set forth in the statement of defence of such defendant.

The defendant Konschur did not appear at the trial, nor was he represented by counsel.

There were produced and given in evidence certified copies of the certificates of title to the south-east quarter and the south-west quarter of section 22, township 2, range 3, west of the second meridian, in the name of Paul Konschur, which certificates of title issued in the year 1903, and shewed the mortgage to the Mutual Life Insurance Company as a first charge upon such lands, as of 3rd November, 1903, and the indorsement of the transfer of such mortgage to the defendant Lavinia Riddell as of 4th June, 1906, the mortgage sued on to the plaintiffs appearing as a second charge, and as registered on 26th July, 1904. The certified copy of the transfer by Konschur to his co-defendant Lavinia Riddell was executed on 4th April, 1906, and registered in the land titles office on 16th November, 1907, and the certificate of title which thereupon issued to Lavinia Riddell is made subject to the mortgage of the plaintiffs as a first charge thereon, and the transfer by the Mutual Life Insurance Company to Lavinia Riddell does not appear.

It also appeared that an application had been made by Lavinia Riddell to have the transfer of the mortgage to her indorsed as a first charge upon the last mentioned certificate of title, and that the registrar refused, and in consequence the matter was referred by the registrar under the provisions of the Land Titles Act to the Chief Justice for his direction as to whether such contention of the defendant Lavinia Riddell should be given effect to, and upon such reference the learned Chief Justice held that the transfer of the mortgage to Lavinia Riddell had been extinguished, and that the registrar should issue the certificate of title free from said mortgage and assignment, which direction was carried out.

In delivering judgment upon such application, Re Riddell, 7 W. L. R. 301, after a review of facts similar to those before set out, the learned Chief Justice said: "I am not prepared to say that there was a merger, but I am of opinion that the intention of the Land Titles Act in force at the time Riddell got the transfer and assignment in question was, in so far as she was concerned, to cause the mortgage to be extinguished. The Act in force at the time of this transfer and assignment and registration was the Land Titles Act, 1894 (Dominion). Section 65 of that

Act provides as follows: 'In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee, that is to say: That the transferee will pay the principal money, interest, annuity, or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.' That section shews, I think, very clearly that the intention was to protect the transferor from any covenants that might be contained in any mortgage or incumbrance upon the land existing at the time of the transfer."

I am satisfied that it was not the intention of the defendant Lavinia Riddell that her security should be merged or extinguished, but, upon perusal of the provisions of the Land Titles Act of 1894, and after careful consideration of the effect of the issue of the certificate of title in the manner indicated, and in view of the decision of the learned Chief Justice, I am of opinion that the defendant Lavinia Riddell cannot be declared entitled to have the first mortgage and assignment to her made a first charge on the lands in question, and the plaintiffs' claim deferred. It was open to her to appeal under the provisions of sec. 139 of the Act from the judgment, and, not having done so, I think she is now precluded from obtaining the desired relief in this action.

There will, therefore, be judgment for the plaintiffs and the usual order for redemption and sale, a reference to the local registrar to take accounts, on the taking of which accounts the defendants shall have credit for the said several sums of $2,225 and $60.14. The plaintiffs to be at liberty to sign judgment against Konschur for the balance so found to be due them, and to issue execution therefor. The plaintiffs to have the costs of this action.

SASKATCHEWAN.

PRENDERGAST, J. MAY 29TH, 1908.

TRIAL.

TAIT AND SUTHERLAND v. GIBSON LUMBER CO.

Sale of Goods—Contract—Statute of Frauds—Sales of Goods Ordinance—Acceptance and Receipt of Part—Oral Evidence — Admissibility — Entire Contract — Refusal to Accept Part—Damages—Failure to Prove Actual Loss—Nominal Damages — Counterclaim — Extra-provincial Company—Foreign Companies Ordinance, sec. 10—Exceptional Dealing—Rent of Land to Store Lumber—Nominal Sum Allowed—Costs.

Action to recover $324, a balance alleged to be due to plaintiffs upon the purchase price of lumber, or in the alternative for damages for defendants' refusal to accept part of the lumber ordered and supplied.

J. McKay, K.C., for plaintiffs.

A. Turgeon, Prince Albert, for defendants.

PRENDERGAST, J.:—The plaintiffs and defendants are lumber firms doing business at Melfort, in this province.

The defendants admit that they bought and took over from the plaintiffs 182,000 feet of lumber of different kinds at different stated prices, and the plaintiffs admit that they received from the defendants $3,332.33, which, as far as that lot goes, is the price due therefor. The issue between the parties is whether the foregoing constitutes the whole contract, as contended by the defendants, or whether, as alleged by the plaintiffs, the contract was for 200,000 feet, the action being brought to recover $324 as balance on the purchase price, or in the alternative as damages for refusing to accept the balance of 18,000 feet.

With respect to the alternate claim, it seems clear that the plaintiffs could not in any event recover as for goods sold and delivered. William Tait, one of the plaintiffs, says that the defendants were to select the lumber out of very much larger quantities of the different kinds owned

by the plaintiffs, and that, although urged to do so, they (the defendants) refused to pick out the balance. The lumber to make up this balance was then never ascertained. It is true that when the plaintiffs later on removed their lumber from the defendants' premises, where it had been piled up some time before the agreement, they (the plaintiffs) left there 18,000 feet of lumber stuff. On the evidence of Johnston, I find that this lumber was not up to the standard of any of the kinds agreed upon. But, even putting this fact aside, the plaintiffs could not exercise this right of selection which the defendants had reserved to themselves, the less so as, according to Tait's own testimony, the defendants could make up the 200,000 feet in such proportion of the different kinds as they thought fit. If the plaintiffs are entitled to recover, it must then be in damages only.

I think it better to also dispose at once of the ground of defence that there is no note or memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds and the Sales of Goods Ordinance. This objection was repeatedly taken at the trial whenever oral evidence of the alleged agreement was being put in, and particularly at the close of the plaintiffs' case, when it was made the ground of an application to dismiss the action. I then overruled the objection, and still believe it was not well taken.

The language of the Ordinance, which is the same as that of the statute, seems plain enough. It provides that cases where "the buyer shall accept part of the goods so sold and actually receive the same," are not within the enactment. In this case, I allowed the plaintiffs to put in oral evidence to the effect that the defendants had taken over from them 182,000 feet of lumber, that they did this under an agreement of bargain and sale, and then (on the disputed point) that the agreement contemplated not only 182,000 but 200,000 feet.

The point seems to depend merely upon whether the 182,000 feet received and the 18,000 feet claimed were the subject matter of the one and same contract.

In Elliott v. Thomas, 3 M. & W. 170, where the plaintiff took from the defendant a verbal order for 35 bundles of common steel at 34s., and 5 bundles of cast steel at 48s., Parke, B., said: "One of the articles, the common steel, was certainly accepted; and the question is whether that acceptance is sufficient to take the case out of the statute as to the cast steel also; and I am clearly of opinion that

it is." Alderson, B., said in the same case: "If the contract be for two classes of goods, does he not accept part who accepts one class?" And Gurney, B.: "Part of the goods included in the contract was accepted; this was sufficient acceptance of the rest."

In Scott v. Eastern Counties R. W. Co., 13 L. J. Ex. the principle was carried further, as Lord Abinger, C.B., said: "It is plain that where an order for goods made and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the statute as regards the latter also." And Alderson, B.: "If a man enters into an entire agreement for goods made and for others to be made, his accepting of the goods made is evidence of his having entered into the agreement."

In Gilliatt v. Roberts, 19 L. J. Ex. 410, which was an action of assumpsit for not accepting 98 quarts of wheat, and where the defendant had accepted part of it, although it was not dressed as agreed, Pollock, C.B., said: "There is only one contract between the parties. The defendant had no right to retain the wheat . . . unless he did so in pursuance of the original agreement. He cannot say he is liable for that under a new contract."

Oral evidence of the agreement was then, in my opinion, properly receivable.

Now, was the agreement for 200,000 feet?

The defendants had at Melfort a lumber yard, with two vacant lots in the rear, which they proposed to use later on. They also contemplated at the time opening yards at other points, particularly at Kinistino.

The plaintiffs, on the other hand, had about 130,000 feet of lumber piled near an elevator at Melfort, and about one and a half million feet at their mills at Barrier River. They also had a comparatively small quantity near the residence of one of the parties at Melfort—but this plays no part in this suit.

In the beginning of November, 1904, before leaving on a short trip to the United States, James Rutledge, the defendants' manager at Melfort, bought a very small quantity of lumber from the plaintiffs, and so did their foreman and book-keeper, Nesbitt, a few days later. The circumstances of these two purchases are very much disputed. The plaintiffs laid a great deal of stress upon them, and tried at great length to shew them in such a light that the agreement in dispute might be inferred from them. But all that evidence is very uncertain; and I must say that, even were I

to accept the plaintiffs' version on that point, I hardly consider it would raise a presumption in support of their claim.

Be that as it may, when Mr. Rutledge came back from the States at the end of November, he found that the plaintiffs had piled a portion of their lumber from their Barrier River mills on the defendants' lots back of their yard. I have no doubt that the plaintiffs had no license whatever to do that. All the explanations of Mr. Tait on this point cannot destroy the import of the letter (exhibit E) which he wrote to Nesbitt on 14th November. But this again, although the matter of very lengthy evidence, is immaterial in my view. It is enough to say—and I do so on the strength of R. Beatty's evidence—that Mr. Rutledge eventually consented that the plaintiffs should continue to pile their lumber on the said lots. This was agreed to, it would appear, on account of negotiations then being carried on between William Tait and James Rutledge towards a purchase by the defendants of all the plaintiffs' lumber manufactured at Barrier mills; and in the event of such negotiations materializing, it was thought to be in the interest of both parties that the lumber be in the meantime piled on the defendants' lots.

In the beginning of February, however, both parties had realized that they could not come to terms on that deal.

Then, on the 19th of that month, James Rutledge writes to William Tait a letter (exhibit A) which is the first step in the matter in issue, and in which he says that he wishes to see him (Tait), as he has to buy "several car-loads," and speaks of meeting him to try and "make a price to suit both . . . say, on a couple of hundred thousand feet."

The two met a few days later and came to the agreement in question.

Tait and Rutledge agree in their evidence that the meeting was at the former's residence, and that Mrs. Tait was present. They agree that a sale of a certain quantity of lumber of different kinds at different prices was made, and they agree as to what those kinds and prices were. They agree also that all the lumber at the elevator, except tamarack plank, was to be taken over first, and that the balance was to be chosen out of the plaintiffs' lumber on the defendants' premises, in such proportions of the various kinds as the defendants saw fit. The only contradiction is on the point of the quantity, which Tait asserts was to be

200,000 feet, while Rutledge swears he only agreed to 150,000—to which, he says, Tait replied, "and if you take more, the better."

Rutledge first took over, as agreed, all that there was at the elevator except the tamarack plank—being about 130,000 feet. He also selected about 52,000 feet of different kinds out of plaintiffs' lumber on defendants' premises, being in all 182,000 feet, which they paid for in full, the plaintiffs accepting the cheque without prejudice. The defendants refused to take any more lumber, and this suit for the balance of 18,000 feet followed.

Mrs. Tait corroborates her husband's evidence, while two witnesses, who may be supposed to bear feelings not altogether friendly to William Tait, swear that he told them, a short time after the event, that he had sold Rutledge 150,000 feet of lumber.

There are, however, two circumstances, neither of which is conclusive in itself, but which, taken together, in my opinion, throw the weight of evidence on the plaintiffs' side.

The first is the correspondence between Rutledge and the head office of his company, just before and after the transaction in question.

In their letter to Rutledge of 14th February (exhibit T) the defendants deal with the yard which they proposed to establish at Kinistino, and say: "In the meantime, it might be well for you to see what you can purchase 10 to 15 cars of stock for Kinistino for, from Cunningham or Tait." Now, 150,000 feet would be less than 10 cars. Then, acting undoubtedly upon this letter, and probably within 2 or 3 days after its receipt, we find James Rutledge writing to W. Tait his letter of 19th February (exhibit A), as already stated, about making "a price to suit both, say, on a couple of hundred thousand feet." And on 26th February Mr. Rutledge writes to his head office a letter (exhibit U), saying, "I saw Tait and bought from him what dry stock will be required at Kinistino" — which connects further the transaction in question with the head office's letter of the 14th.

The second circumstance is Mr. Rutledge's attitude upon an occasion when he was asked to select the balance of the lumber. This is testified to by Tait and James Forsyth. It is not at all established, as Tait says, that Rutledge was asked in as many words to "select the balance of the 200,000 feet." I do not think the last words were used at all on that occasion.

But Forsyth's evidence is to the effect that Tait once asked Rutledge in his presence "what lumber in the yard he was going to take the balance of the lumber out of," and that Rutledge seemed then to be on the point of going about the yards with them, when he was called away by some customers. He says that the next day, being sent by Tait, he (Forsyth) again went to the yard and again asked Rutledge what lumber he would select "for the balance," that Rutledge seemed to hesitate, then looked at a pile, saying that he might take it, and finally said they were not going to take any more. It is shewn that at this time Rutledge had already taken over the 182,000 feet. Of course, Forsyth uses only the word "balance" or "balance of the lumber." He refused to swear that 18,000 feet or any other specific quantity was mentioned to Rutledge in his presence with reference to this balance. Still, unless there was yet some balance to be taken over, I do not see why Rutledge did not at once say that he had selected all that had been agreed upon.

I must say, however, that I have come to the above conclusion mainly from the two circumstances referred to, and then only with considerable hesitation. I should add that the evidence of James Rutledge appeared to me to be given in as good faith as that of any other witness.

I have already said that the plaintiffs could only recover in damages. What actual damages, then, have they suffered? I do not see that there is the faintest ground for the contention that they suffered any whatsoever.

There is no other evidence on this point than that of William Tait, and here it is in full:—

"Q. Have you suffered any loss by their not accepting it, by not taking that lumber?

"A. I do not know. Not any more than the loss of the money and the tying up. I do not know that there was any damage. But we certainly suffered some.

"Q. At the time you sold the lumber, could you have resold it?

"A. I could not re-sell it after I had sold it to them. I could not sell it a second time.

"Q. Was that lumber ever paid for?

"A. No, it was never paid for—the 18,000 feet. Had I not sold it to them, I could have sold it.

"Q. At that time could you have sold it at that figure, $18 a thousand?

(No answer.)

"Q. You did not have to handle it?

"A. It would have cost me quite a bit to have moved it.

"Q. What damage have you suffered?

"A. I suffered the damage of laying out my money.

"Q. If it was worth $18 then, how much is it worth now?

"A. The price of lumber has all gone up, all over. The demand for lumber is greater."

Nor is the present action of that class where, as in libel or slander, a certain amount of actual damage may be presumed.

The plaintiffs are, however, entitled to the nominal damage which is supposed to result from the non-fulfilment of every lawful agreement, and this I fix at $1.

The defendants counterclaim $150 for rent, in connection with the lots at the rear of their yards, upon which the plaintiffs piled lumber from their Barrier River mills. The defendants, at the time of the institution of the action, were a foreign company who had not registered under the Foreign Companies Ordinance, and it was objected that they could not maintain their counterclaim on that ground. I am of opinion, however, that the prohibition of sec. 10 is meant to apply only to transactions which come within the usual business transacted by the company or for which it was incorporated, and not to an occasional or exceptional dealing, such as the one in question, unconnected with its general purposes.

On the facts, relying upon the evidence of Dufferin Nesbitt, which I consider corroborated by William Tait's letter to him of 14th November, I find that the plaintiffs, some time after James Rutledge had left for the States, laid down without leave a certain quantity of lumber on the defendants' premises, promising to give them some remuneration therefor. The letter says, "Kindly store the lumber for me and I will make it right." On the other hand, on the strength of Mr. Beatty's evidence, I find that as soon as James Rutledge came back, he entered with William Tait into the arrangement already referred to, by virtue of which the plaintiffs were allowed to pile their lumber on the defendants' premises, as I understand, free of charge. It would thus appear that the plaintiffs so occupied the defendants' lots for a very short time only previous to the said agreement, less than 2 weeks, it would seem, possibly not more than 10 days. Nor, according to

the statements filed (exhibit J), could there be a large quantity on the lots at the time. There is also the fact that the defendants were not then using those lots. The evidence on all these points is, however, uncertain, so that I shall only allow on the counterclaim the nominal sum of $1.

With respect to costs, the plaintiffs manifestly knew when they instituted the action, just as well as William Tait when giving evidence, that they had suffered no actual damages at all. I will then allow them the costs of a small debt action only.

The defendants will also have costs of a small debt action on the issue in which they are successful.

There will be judgment for plaintiffs on the claim for $1, and for defendants on the counterclaim for $1, in each case with costs as stated.

YUKON TERRITORY.

DUGAS, J. APRIL 16TH, 1908.

CHAMBERS.

REX v. MITCHELL.

Criminal Law—Order of Magistrate Requiring Accused to Furnish Security to Keep the Peace—Criminal Code, secs. 748, 749—Right of Appeal.

Upon the complaint of one Marie Joussaye Fotheringham, the defendant, Margaret Mitchell, was on 28th January, 1908, ordered to furnish security to keep the peace under cl. 2 of sec. 748 of the Criminal Code, R. S. C. 1906; and appealed from this order to DUGAS, J., under sec. 749.

George Black, for the defendant.

DUGAS, J.:—Section 749 of the Code declares that "unless it is otherwise provided in any special Act under which a conviction takes place, or an order is made by a justice for the payment of money, or dismissing an information or

complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant as well as the defendant, may appeal . . " in this Territory, to a Judge of the Territorial Court.

Clause 3 of sec. 748 enacts that "the provisions of this part shall apply so far as the same are applicable to proceedings under this section, and the complainant and the defendant and witnesses may be called and examined and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaints." This part contains sec. 749, under which appeals are permitted on summary conviction, and the appellant is limited by it in his right to appeal. It will be noticed that such a right only exists "when a conviction takes place or an order is made for the payment of money, or dismissing an information or complaint."

In ordering a person to enter into a recognizance to keep the peace, the Judge or justice who hears the complaint enters no conviction, nor makes any order for the payment of money. Having satisfied himself that the complaint is not vexatious, and that there is really some danger of some of the injuries specified in the section, from the defendant, his order is simply to the effect that the party accused will bind himself to keep the peace and be of good behaviour, etc. In this cannot be found a conviction or an order for the payment of money. The right of appeal is created by statute and is of strict law, and, unless such a right is clearly given, it does not exist.

Under the common law there is, in some instances, some relief, not by way of appeal, but by direct interference of higher Courts, when, for instance, there is no more reason to keep the accused party under such a restraint: when, instead of giving security, the party goes to gaol, then, under sec. 1059, the Judge of a higher Court, or a stipendiary magistrate, may, after two weeks' imprisonment, liberate the prisoner.

I have, therefore, to declare that this appeal cannot be heard by me, and that the application to that effect is not entertained. As the other party did not appear, there will be no costs.

YUKON TERRITORY.

MAY 19TH, 1908.

FULL COURT.

DAVISON v. SCHWARTZ.

Husband and Wife — Business Carried on by Husband in his own Name Alleged to be Property of Wife—Seizure of Plant and Stock of Business under Execution against Husband—Claim by Wife—Interpleader Issue — Evidence—Married Woman's Separate Estate—Statutes—Burden of Proof—Change in Business—Notice—Registration of Declaration.

Appeal by plaintiff from judgment of CRAIG, J., 7 W. L. R. 338, in favour of defendant in an interpleader issue.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. T. Congdon, K.C., and Frank J. Stacpoole, for plaintiff.

George Black and R. L. Ashbaugh, for defendant.

DUGAS, J.:—After perusing the evidence in this case, minutely summed up in the judgment of the learned trial Judge, I cannot see upon what the appellant can stand to have her contentions upheld.

It has been admitted by her own counsel that until the assignment made to her by her husband she would have had no such right as the one claimed; but the argument is that the respondent Schwartz, more particularly, having known of the assignment of the husband to his wife, was thereby sufficiently notified that the wood business managed by the appellant's husband was really hers; besides, that the wood cut on the timber limits over which she had a license, became her property as soon as cut.

It cannot be denied that, even if, as contended by the appellant, the wood business was, in fact, exclusively hers, this did not preclude her husband, although her manager, from doing business for himself if he so chose. Even if

admitted that Schwartz, or any other citizen, knew that the Klondike Fuel Company, having Davison as its manager, was the appellant herself, the proof is to the conclusive effect that this wood was cut at the instance of the appellant's husband, J. H. Davison, and for himself.

There is not a particle of evidence which even would raise the suspicion that this wood was intended to be the appellant's. All through it is the very contrary which appears, and this, until the respondent, after having obtained judgment under his contract with the husband, attempted to have the same judgment satisfied upon the very wood which he had cut.

Let us say for the sake of argument that, contrary to the allegations of the appellant, her husband did really intend to have that wood cut for himself. Could he have acted otherwise than he did, and if, contrary to what happens in the present case, the judgment had been against the wife and the wood seized under that judgment, could he not, by the facts divulged, conclusively prove that this wood was his? To maintain the appellant's contentions would be giving too much scope to any attempt to evade payment of a just debt.

I can no more even find as well founded the contention of the learned counsel for the appellant, that as soon as cut the wood became her property, because it was from the timber limits over which she had a license. The license was given for a limited number of cords of wood. Other licenses could have been properly given to others over the same limits; to the appellant's husband as well as to any third party; and wood cut by others than herself without a license, did not become her property, no more than fish in a pond over which some one might have a license, would become the property of the licensee if taken out of the water by any third party.

Even if the Klondike Fuel Company had been registered, as our Ordinance requires, I consider that it would not have made the position of the appellant better, though this absence of registration still weakens the same.

For these and the reasons given by the learned trial Judge, as well as by Mr. Justice Macaulay, I am of the opinion that this appeal should be dismissed with costs.

The judgment will be amended to include only the wood, horses, and the articles abandoned by written order as being the property of J. H. Davison.

MACAULAY, J.:—The onus was on the plaintiff in this interpleader issue to prove her title to the property, and the learned trial Judge who tried the issue found as a fact on the evidence—and I think properly so—that the property in question was the property of J. H. Davison, the husband of the plaintiff, and not the property of the plaintiff, and as such was liable to seizure under the execution of the defendant.

Counsel for the defendant stated on the argument that only the wood and horses were claimed as the property of J. H. Davison, and the other articles were included in the order or judgment by mistake. The order will, therefore, be amended accordingly to include the wood and horses only.

It was argued by counsel for the plaintiff on appeal that the wood in question, having been cut under permits granted to the plaintiff by the government of Canada, became the property of the plaintiff immediately upon being cut, and therefore could not be said to be the property of J. H. Davison, the husband of the plaintiff. In my opinion, that would be a matter of accounting between the plaintiff and her husband, J. H. Davison, as between themselves only, and would not affect the public. After the bill of sale from J. H. Davison to the plaintiff had been executed, Davison says the name of the business was changed, and the business was thereafter known by the name of "the Klondike Fuel Company, J. H. Davison manager." No declaration was filed, as required by sec. 4 of ch. 41 of the Consolidated Ordinances of the Yukon Territory, and no notice was given to the public of any change, as provided by that Ordinance. His conduct throughout was such as to lead the public to believe the business was his, and, when sued by the defendant, he certainly led him to believe the business was his. On the whole evidence, I think the trial Judge was perfectly warranted in arriving at his conclusions.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

YUKON TERRITORY.

MAY 19TH, 1908.

FULL COURT.

HAMMOND v. STRONG.

Mortgage—Interest in Mining Claims—Representation Work—Redemption—Tender before Action—Refusal—Deed of Reconveyance—Conditional Tender—Readiness to Implement Tender—Pleading—Costs—Counterclaim—Amendment — Foreclosure—Appeal Book — Preparation—Mistakes.

Appeal by plaintiff from judgment of DUGAS, J., 6 W. L. R. 694.

The appeal was heard by CRAIG and MACAULAY, JJ.

F. J. McDougal, for plaintiff.

F. T. Congdon, K.C., for defendant Strong.

M. B. O'Dell, for other defendants.

CRAIG, J.:—The facts in this appeal are as follows. The plaintiff was the owner, with one Steele, of 10 placer mining claims, each being entitled to a half interest. The plaintiff mortgaged by giving an absolute bill of sale to one Edna V. Clark. Steele also gave a mortgage to the same party. Clark conveyed to Strong by an absolute bill of sale also, but Strong at the time of the conveyance was aware of the equity of redemption existing in the plaintiff and in Steele. The mortgage was dated in September and October, 1904, by two separate instruments, and the conveyance was made to Strong on 16th May, 1906. On 6th September, 1906, tender was made to Strong of $750, accompanied by a re-conveyance from him to the plaintiff of a half interest in the 10 claims covered by the security. The plaintiff is seeking redemption based upon that tender. Up to the time of the trial the defendant Strong claimed a larger amount of money than the sum tendered, namely, $1,038.25, but it was admitted that $750 was all he could properly claim. The plaintiff, as well as asking for redemption, asks, in the alternative, that she be given damages because she

failed to renew 5 claims covered by the security because the defendant Strong had represented that he had staked or would restake the claims for the benefit of the plaintiff under the law then in force entitling stakers to larger ground, thus saving the expense of representation; and the plaintiff further alleges that as a fact the defendants Morrow and Boucher did for Strong re-stake this very ground, and that they held as trustees for Strong, and that, if not, then she was entitled to damages for Strong's misrepresentation of the facts of the re-staking. The ground in question ran out, as we say here, under the regulations, from 20th to 30th May, the first two claims expiring on 20th May, 1906, the next on 23rd May, and finally on 30th May, and the last claim on 9th June. Strong denies that he made the representations in question or that the claims were staked for him or at his suggestion by Morrow or Boucher.

As to the facts the learned trial Judge dismisses the plaintiff's case, thinking there is very little difficulty apparently, if one may judge from his judgment, under the evidence, or in coming to a conclusion upon the evidence. I cannot say I feel that way myself. I should have found very great difficulty in coming to a conclusion upon this evidence if I had been the trial Judge. There are so many incidents and coincidences and facts which strongly support the contention of the plaintiff that I would have been disposed perhaps to have come to a different conclusion. But, as I do not see my way clear to setting aside the judgment of the trial Judge upon the facts, there not being such preponderance of evidence as would entitle me, I think, under the authorities to do that, I cannot disturb his finding, and I am more disposed not to disturb the finding because, even if the facts were as I view them in regard to the representation, I do not think as a matter of law the plaintiff could succeed.

It is alleged that the plaintiff did sufficient representation work to entitle her to renewal of the claims. I may say in passing that I very much doubt whether I could find as a fact that that is true. The plaintiff's own evidence is by no means conclusive upon that point, or the evidence of her husband, and the evidence of her own witness Steele is directly opposed to that contention. I do not think that Steele is a very good witness, and I would not be inclined to give very much weight to his evidence, because I cannot understand how a man would, as he says he

did, deliberately indicate to another, namely, Morrow, that he could stake or jump his own property; that is, that Steele put it in the power of Morrow, in fact told Morrow, to stake property which Steele owned and which Steele knew was covered by Strong's mortgage, Steele actually being the person who took Morrow to the staking ground, drew up his application in the presence of Strong, the mortgagee, who swore the affidavits, who carried them to the recording office and obtained the grants on the two several occasions, 2nd and 10th June, when those claims were staked. It is impossible for me to believe that Steele did that, depriving himself of his own property, and also depriving the man whom he says he got into the loan (Strong) of his security at the same time. However that may be, even the plaintiff's own evidence is not sufficient to satisfy me that the representation work was done. That is not the main ground on which I base my judgment.

It is alleged that Hammond some time before 2nd June sent down by Clark affidavits of representation of the two claims first expiring. What became of these affidavits we do not know. Clark never filed them. Hess, a witness for the plaintiff, says he called at the gold office and made a search on 2nd June, and found that these claims had been re-staked; that he thinks on the same day he saw Strong, who told him not to bother, that these claims had been re-staked by him for the benefit of the plaintiff. Hess is clearly mistaken in this. He could not possibly have seen that they were re-staked until some time on the 3rd, because the staking was made at midnight on the 2nd, and Strong next day brought the affidavits to Dawson and filed them. Now, Hess being wrong about the 2nd, might be equally wrong about the 3rd, and if he is, he might be 2 or 3 days astray in the dates, even if the conversation which he alleges took place did take place. Strong denies that it ever took place. Hess was a voluntary agent, he says, of Hammond, the plaintiff. He had no power of attorney, no authority to bind Hammond or to accept notices for him, and there is not a particle of evidence that Hess conveyed to Hammond the information which he says Strong conveyed to him; certainly not in time for Hammond to have prevented the damage which she says arose by reason of the misrepresentation. Therefore, if the misrepresentation be taken as proved, no damage resulted to Hammond by reason of it, because long before she received any notice, her right to renew the ground had expired. The only corrobor-

ation of the story of Hess is that given by Hammond and his wife, who say that about 25th July they had a conversation with Strong, who told them that the claims had been staked by Steele or through Steele at Strong's instance for the protection of Hammond. Strong denies this conversation as well, and the trial Judge believed Strong, and, as I have already said, I am not going to disturb the trial Judge's finding, because I am not in a position to say that the evidence is conclusive or so conclusive as to justify me in so disturbing it. It is quite possible that Strong may have sworn the affidavits without knowing their contents, and, although he was on the ground at the time of the staking, that is, in the vicinity, that he did not know that the ground staked was covered by his security, and did not until long after that discover it. All this is possible, and Hammond and his wife may be now endeavouring to bolster up a fictitious claim against him, and Hess may be giving his evidence to support what was suggested was a small claim which he has against the Hammonds for money lent. The tender in amount is admitted to have been sufficient, and Strong was not justified in refusing it so far as the amount was concerned. But the tender was accompanied by a conveyance of the 5 expired claims. Strong did not read the conveyance, and that was not the ground of his refusal, and I doubt from the evidence whether he was aware of what the conveyance did contain, and, as I view this matter, I do not think it necessary for me to consider the law as to the tender at all. The only question involved in it is the question of costs, and the costs were not increased by reason of Strong's refusal, because the other issues which were involved in the action were tried out, and the costs were not increased one particle by Strong's refusal of the tender. Therefore, I make no finding upon that branch of the case, and, viewing the evidence as I do, and with the respect which should be paid to the view of the trial Judge, I think the appeal should be dismissed.

I may say that the appeal book in this case is, like many other appeal books which have come before this Court, very carelessly prepared. The learned trial Judge refers to the evidence of Boucher. No such evidence was given at the trial as appears by the appeal book. This matter having been referred to the trial Judge, he says that he has a note, "Examination of Boucher on Discovery," which he says means for him that the same was received and read. There is no exhibit mark. Counsel for the def-

not assert that he put it in; in fact, I suppose he could not put it in, being evidence of his own client. Counsel for the plaintiff strongly asserts that he did not put it in. How it came to be mentioned in the notes is not explained; but certainly we have not got the benefit of his evidence. Then it appears from the notes in the trial that the examination of Strong, the defendant, was read as part of the case for the plaintiff. That evidence is not put in. At another place in the evidence of Hammond he is made to say exactly the opposite of what he is contending for, a clear error, and all through the book there are verbal errors shewing an absolute want of revision. Only that the unfortunate client would have to suffer under a penalty for these mistakes of solicitors, it seems to me that a salutary lesson would be taught solicitors if such careless books were thrown out of Court altogether and not read. Something must be done to make solicitors more careful of their appeal books. Probably if they were ordered to pay the costs of an adjournment and a reframing of the book, more care would be exercised in their preparation in the future.

MACAULAY, J.:—In this case—which was an action for redemption under a mortgage of some 10 claims on Hunker Creek in the Yukon Territory, and for a declaration that 5 of the mortgaged claims, which were permitted to lapse and had been re-staked by the defendants Moreau and Boucher, were really the property of the defendant Strong and had been re-staked for his benefit, or, in the alternative, for damages against the defendant Strong for the value of the claims, upon the allegation that the renewals of the claims had not been perfected by the plaintiff, owing to the representations made by the defendant Strong that the lapsing and re-staking of the claims had been arranged for the benefit of the plaintiff, inasmuch as 4 of the claims were grouped as one claim under the re-staking, and that a large expense previously incurred in the representation of the claims would, in the future, be avoided—there was a considerable conflict of evidence, and the learned trial Judge, immediately after the hearing of the case, dismissed the action with costs as against the defendants, Moreau and Boucher in regard to the 5 claims, and, as to the representations made by Strong to the plaintiff that the re-staking had taken place for her benefit, which were denied by Strong, the learned trial Judge decided these facts in favour

of the defendant Strong, and held that the alleged representations had not been made.

At the time of the staking by Moreau and Boucher, these defendants were in the employment of the defendant Strong, and when the 4 claims were staked by Moreau, they were pointed out to Moreau by one Steele, who was a co-owner with the plaintiff, and the defendant Moreau started from a cabin on Hunker creek adjoining these hillsides, in the company of Steele and one Morton, a fellow workman, who says he thinks Strong was present at the cabin at the time, and asked him to go along as a witness to the staking; which set of circumstances undoubtedly raises a strong suspicion in one's mind that Strong and Steele were interested in the re-staking. Steele says that he thought Moreau was re-staking the property for him. Strong says, however, that he had no idea that the claims to be re-staked were the claims upon which he held a mortgage, and although, after the re-staking, he was the commissioner who swore the affidavits attached to the applications for grants, and actually, the next day, took the applications to Dawson and paid for the grants out of his own pocket, which sum he says he charged to Moreau, who was then in his service as a workman, he was not aware until after the grants were obtained that these claims were the claims which the plaintiff and Steele had mortgaged, and which he held under an assignment of mortgage.

Moreau states positively that he staked those claims for himself; that he would not use his right to stake on any creek for any person other than himself; and that Boucher staked the fifth claim for him. The facts shew that it was staked by Boucher and transferred to Moreau.

The learned trial Judge mentions Boucher's name in his judgment as having given evidence on the trial; but the appeal book does not shew that his evidence was given, although counsel stated that he had been examined for discovery, and it may have been that his examination for discovery had been put in. On referring to the notes of the trial Judge, I find that the examination on discovery of Boucher had been put in. His evidence goes no further than to state that he only staked the claim for Moreau at his request and transferred it to him.

However, the trial Judge, who had the advantage of seeing the witnesses giving their evidence, is in a better position to judge of their demeanour and manner of giving testimony than I am, although no comment whatever is

made by the trial Judge on the evidence in this case; and, while the above circumstances do create a considerable amount of suspicion in my mind, I must have stronger grounds than suspicion before I can reverse the trial Judge on his finding of fact in regard to the ownership of the claims; and he having found in favour of the defendants Moreau and Boucher, I do not think his finding should be disturbed.

As regards the representations made by Strong that the claims were staked for the benefit of the plaintiff, we have the evidence of one Jacques Hess, which was taken under commission at Seattle, in the State of Washington, who says that he transacted business as the voluntary agent of the plaintiff and her husband, without receiving any remuneration therefor; and that he was actuated by pure motives of friendship, as he did not think Mr. Hammond, the husband of the plaintiff, knew how to transact business.

There is evidence that the plaintiff's husband, assisted by some workmen, did do the amount of representation work upon these claims prior to the time they lapsed and reverted to the Crown, and that affidavits of representation had been handed to one Clark, who was the husband and agent of the original mortgagee, whose mortgage, which was in the form of a bill of sale, but which is admitted to have been a mortgage, had been transferred to the defendant Strong; and that either Clark or Hess was to see that these affidavits of representation were properly filed, and the claims renewed. The evidence is not very clear on this point. In any event Hess says he would have renewed the claims only for the representations of Strong. He says in his evidence: "I think on 2nd June I went to look up the book if certain representation papers had been sworn in, and I found out that the claims in question had been re-staked—re-located—instead of the representation work being sworn in." He then says he went to see Strong and asked him about this, because then he had time to save 3 out of the 5 claims. He says: "I am under the impression that 5 claims were re-located. Three of those claims I would have had time to save, in case the re-location had been done by somebody else, but Mr. Strong told me that this re-locating was done for the sake of grouping those claims, and in order to save Mr. Hammond's money." Mr. Hess is evidently wrong about 2nd June, because it was

on 2nd June, 1906, at or about midnight, that the claims had been re-staked, and only 4 claims had been staked at that time and not 5.

He says that he had other conversations with the defendant Strong, in which he told him again that what had been done had been done for the plaintiff's benefit, or words to that effect.

The plaintiff says that about 25th June Strong came to her house and had a conversation with herself and her husband, but the claims were not discussed at that conversation, but that upon a second visit towards the end of July, made by Strong to her cabin on Hunker creek, the matter was then brought up in the presence of her husband, by her stating that she was surprised at Steele having these claims re-staked without notice to her, and that Strong stated that Steele had not done it at all; that he had the claims re-staked for her benefit.

The plaintiff's husband practically corroborates this statement, but says that he had the impression that the conversation had taken place upon Strong's first visit in June.

Strong denies that he ever made such statements, either to Hess or the plaintiff or her husband; that he never had any interest in the claims; and that no such promise was made.

The representations, if made, were made after the re-staking and re-locating of the claims, and at a time when he could not have procured the claims for the plaintiff, except possibly the representations made to Hess when, at that time, Hess says 3 out of the 5 claims could have been protected; and there again we have the evidence of Hess on the one side and Strong on the other, and the further fact that has already been found that Strong could not control the claims at the time. The learned trial Judge having decided this question of fact in favour of Strong, I do not feel inclined to disturb this finding.

The further question to consider in this case is the question of tender. Before action brought the plaintiff, through her solicitors, tendered to Strong the sum of $750, in full of all principal and interest due him under the mortgage, and also at the same time tendered him a bill of sale

or a reconveyance of the 10 claims mortgaged, including, of course, the 5 claims which had lapsed and been re-staked.

The defendant Strong claimed the sum of $1,038.25 as due him under the mortgage, and refused to accept the amount of money offered to him. He admits himself that he did not know, and did not ask, whether the bill of sale tendered to him for execution covered the 5 claims which had lapsed to the Crown and been re-staked or not. He did not think the amount of money tendered to him was sufficient, and refused to accept it. On the trial it is admitted that $750 was a sufficient sum to have paid off the mortgage debt, including any interest and costs that might have accrued thereon or attached thereto.

The learned trial Judge was of opinion, under the authority of Kinnaird v. Trollope, 42 Ch. D. 515, and under the Rules of our Court, that the plaintiff was obliged not only to offer the money unincumbered, but also to be always in readiness to pay, besides bringing the money into Court, in order to be relieved of the costs of the action.

Various cases were cited to us on this point, and, amongst others, the case of Gyles v. Hall, 24 E. R. 774, in which Lord Chancellor King says that "it ought to appear that the mortgagor, from the time the tender was made, always kept the money ready to pay at any time," and although I would not go so far as the learned Judge in holding that the money must be paid into Court, it should always be ready, and there is not evidence here that the money was always ready.

Besides, the tender, although refused by Strong, was not an unincumbered tender, because the bill of sale which was handed to him for execution covered the 5 claims that had lapsed and been re-staked, in addition to the other claims; and, moreover, this was not a simple action for redemption, as the plaintiff asked for a declaration that the 5 claims that had been re-staked were the property of Strong, and should be re-conveyed, or, in the alternative, damages for his false representations; and, on the whole, I do not think it was such a tender as would entitle the plaintiff to be relieved of costs. I am, therefore, of the opinion that this appeal should be dismissed with costs.

YUKON TERRITORY.

MAY 19TH, 1908.

FULL COURT.

ALLMAN v. YUKON CONSOLIDATED GOLD FIELDS CO.

(TWO ACTIONS.)

Security for Costs — Residence out of Jurisdiction — "Ordinarily Resident"—Roving Plaintiffs.

Appeal by defendants from order of CRAIG, J., 6 W. L. R. 813, refusing a motion by defendants for security for costs of two actions brought by William Allman and Arthur Allman respectively.

The appeal was heard by DUGAS and MACAULAY, JJ.

J. B. Pattullo and H. S. Tobin, for defendants.

F. J. Stacpoole and J. A. Clarke, for plaintiffs.

MACAULAY, J.:—In these cases, which are consolidated for the purposes of appeal, Craig, J., who heard the applications, refused to make orders for security for costs under Rule 528 of the Yukon Ordinance and the English Rule 981 (a), Snow and Burney, 1904, p. 953, which is the law applicable to the Territory, and which Rules are exactly the same as the Ontario Rule 1198.

On the argument before us the following cases, amongst others, were cited: Redondo v. Chaytor, 4 Q. B. D. 453; Ebrard v. Gassier, 28 Ch. D. 232; Howard v. Howard, 30 L. R. (Irish) 340, cited in Digest of English Case Law at p. 348; Denier v. Marks, 18 P. R. 465; Michiels v. Empire Palace Limited, 66 L. T. 132; Alcroft v. Morrison, 19 P. R. 59; Kavanaugh v. Cassidy, 5 O. L. R. 614; 2 O. W. R. 27, 143, 303, 391; Nesbit v. Galna, 3 O. L. R. 429, 1 O. W. R. 218; Cordingly v. Johnson, 11 Man. L. R. 4, 7; Clark v. Hamilton, 5 Terr. L. R. 110; Moffatt v. Leonard, 6 O. L. R. 383, 2 O. W. R. 787; and these cases, with the references contained therein, I think nearly exhaust the law upon the question.

Without differing from the reasoning of Moss, J.A., in Alcroft v. Morrison, and that of Boyd, C., in Kavanaugh v. Cassidy, or from the opinions of the Judges in Howard v.

Howard (and the views of the Judges as expressed in those cases contain the views of the majority of the Judges in the cases above referred to), I think this appeal should be dismissed, as the plaintiffs in these cases, in my opinion, occupy a much stronger position than any of the plaintiffs did in any of the cases referred to, except perhaps the plaintiff in the case of Moffatt v. Leonard.

The plaintiffs are brothers, born in London, England, and unmarried. They crossed the Atlantic to better their respective positions, and were engaged in working at their trade as carpenters here. William left England only about 2 years ago, and most of his time has been spent in this Territory during that period. Arthur has been away from England for 10 years, and until about 3 years ago most of his time since leaving England had been spent in different parts of British Columbia; but for the past 2 or 3 years a considerable portion of his time has been spent within this Territory. They came here in the spring of 1907 from Vancouver under a written contract with the defendants, and one of the terms of the contract, upon the fulfilment of certain conditions therein contained, entitled each of them to a return ticket to Vancouver. After their dismissal, each applied for his return ticket to Vancouver, and each says it was for the purpose of disposing of it, as he thought that under the terms of the contract he was entitled to this return ticket or passage. Both plaintiffs had been in the Yukon Territory previous to their return in 1907 under the contract with the defendants, and both in their affidavits and on cross-examination say they intend to stay here so long as they can obtain employment, because they think their chances for success are better here than elsewhere. This is newly occupied Territory, and many have come here to seek their fortunes owing to the rich gold discoveries that have been made here, and, although no person, I think, has come into this Territory with the intention of spending the remainder of his life here, still the Territory has become the ordinary place of residence of many persons. The plaintiffs have left their home in London, England, and it cannot be said to be their ordinary place of residence any longer, and this is not contended. Vancouver, B.C., cannot be called their ordinary place of residence, and, in my opinion, after reading the evidence, this is the only country that can be said to contain their ordinary place of residence.

I am, therefore, of opinion that the appeal in these cases should be dismissed with costs. Costs in one appeal to be set off as against costs in the other appeal.

DUGAS, J.:—I agree with my learned brother Mr. Justice Macaulay that these appeals should not be allowed.

Personally I consider that it is useless to refer to the authorities, which in England and in Ontario are greatly contradictory. We are here under very different conditions, and the law has to be applied with less strictness, so far as the ordering of security is concerned, than in other centres of civilization.

I think it can safely be said that there is not a citizen within this Territory who ever intended to settle here for life. We are all, so to speak, transient, with the earnest hope to return sooner or later to our old homes. Aside from the government officials and a few citizens whose callings may be considered as attaching them here for a period more or less limited, no one knows how long his residence will be continued in the Yukon. All depends on the more or less success which he may meet in his ventures.

The respondents are of this class, and, no more than any other similar litigant, should they be compelled to give the security asked for.

Those are the facts found by the learned trial Judge, and I believe that his judgment should not be disturbed. Therefore, I am in favour of dismissing this appeal with costs, to be set off in one appeal against the other.

YUKON TERRITORY.

MAY 19TH, 1908.

FULL COURT.

ALLMAN v. YUKON CONSOLIDATED GOLD FIELDS CO.

(TWO ACTIONS.)

Master and Servant—Dismissal of Servant—Justification—Incompetency — Contract of Hiring—Provision Making Master Sole Judge—Exercise of Power of Dismissal for Cause and without Fraud or Caprice—Bonus.

Appeals by plaintiffs from judgment of CRAIG, J., 7 W. L. R. 318, dismissing the actions.

The appeals were heard by DUGAS and MACAULAY, JJ.

F. J. Stacpoole and J. A. Clarke, for plaintiffs.

J. B. Pattullo and H. S. Tobin, for defendants.

MACAULAY, J.:—These were actions for damages for wrongful dismissal under a written contract of hiring, which contract is fully set out in the judgment of the trial Judge. The evidence in both cases being similar and the terms of the contract being the same in both cases, they were consolidated for the purposes of trial and also for the purposes of appeal.

The learned trial Judge found as a fact, on the evidence, that the plaintiff in each case was dismissed for cause, and after examining the evidence I see no reason for disturbing his finding.

It was argued that the contracts were illegal, owing to the provisions of clause 4 in the contracts, which provides, amongst other things, that in all cases the employer should be the sole judge as to the sufficiency of the grounds for discharge and termination of the contract, as being an attempt to oust the jurisdiction of the Courts; and the cases of Scott v. Avery, 25 L. J. Exch. 308, Horton v. Sayer, 29 L. J. Exch. 28, and Lee v. Page, 30 L. J. Ch. 856, were cited in support of this contention. The case of Scott v. Avery was an action on a policy of insurance, where a mutual assurance company inserted in all its policies a condition that when a loss occurred a suffering member should give in his claim and prove his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member the matter should be referred to arbitration; and that no action should be brought except on the award of the arbitrators; held, that this condition was not illegal as ousting the jurisdiction of the Courts. Horton v. Sayer was an action under a lease of a coal mine, where it was agreed between the parties that any and all matters of difference between them should be settled by arbitrators, and with mutual covenants to obey and perform the award, and not to bring any action at law or in equity without first submitting all matters to arbitration; held, that, as the agreements and covenants to refer were absolute to oust the jurisdiction of the Superior Court, they were void for that purpose, and could not be pleaded in bar to an action for not raising 4,000 tons of coal as provided. The case of Lee v. Page was a case of partnership between two solicitors, and, in my opinion, does not apply to the case before us. The case of Horton v. Sayer differs from the cases before us, as there is no agreement here not to appeal to the Courts. I cannot find that the provi-

sions of these contracts were such that it could be held that there was any attempt to oust the jurisdiction of the Courts, and I think the cases of Roberts v. Bury Commissioners, 5 C. P. 309, and Blisset v. Daniel, 10 Hare 503, and the line of authorities considered by the learned trial Judge, are more in point, and the parties having agreed that the employer should be the sole judge of the competency and efficiency of the workmen, they are bound by his decision, provided that his judgment was exercised fairly and not fraudulently or capriciously, and the authorities go so far as to hold that the decision, if arrived at in good faith and bona fide, even if upon mistaken grounds, would be valid. But in these cases we have not to consider this latter question, because the learned trial Judge found—and I think rightly—that the plaintiffs were dismissed for cause.

It was also contended that, under the terms of the contracts, the plaintiffs were entitled to notice of the defendants' intention to dismiss, and also entitled to a hearing of the charges preferred against them, and this was denied them in the present cases, and in support of this contention the cases of In re Firmington School, Ex p. Ward, 10 Jur., referred to in Willis v. Childe, 20 L. J. Ch. 113, Hayman v. Governors of Rugby School, 43 L. J. Ch. 834, and other authorities, were cited. These were cases where masters were dismissed by trustees of different schools, some of which schools were founded by charter and others appointed trustees under the will of the founder of the school. It was held in some cases that the trustees had the power to dismiss without notice, and in others that notice was required; but the test was the sufficiency of the powers vested in the trustees under the instruments by which they were appointed. In Hayman v. Governors of Rugby School it was further held that, although the governing body might dismiss the master if they gave reasons for the dismissal, the Court would look at the sufficiency of those reasons.

In this case I think, under the agreements entered into between the parties, whereby it was provided that the employer might terminate the employment at any time, and that he should be the sole judge as to the sufficiency of the grounds for discharge, upon all the authorities the defendants had the right to dismiss without notice, provided that they acted fairly and honestly, and the trial Judge has found that they so acted; and there is also evidence that the plaintiffs did have a hearing before Mr. McCarthy, the defendants'

superintendent of dredges, who then made further inquiries and could see no reason for reversing the decision of the foreman Clements who dismissed them.

It was also contended that the dismissal should be a corporate act and should have been made by the board of directors, because by the terms of the written agreement the employer alone has the right to dismiss, and, if it were intended that the power should be delegated, the agreement should so provide. No authorities were cited on this point. The contract itself is not under the corporate seal of the company, but signed by one John Clements as foreman for the company, and I am of opinion that such acts as the hiring and dismissal of workmen are not such acts as required the corporation to act as a body corporate by resolution and under seal: see Leake on Contracts, pp. 512 and 513, and Austen v. Bethnall, 43 L. J. C. P. 100, and other cases referred to in the foot-notes at pp. 512 and 513 of Leake on Contracts.

On the whole cases I am of the opinion that the appeals should be dismissed with costs. Costs in one appeal to be set off as against costs in the other appeal.

DUGAS, J.:—I also agree in this case with my learned brother Mr. Justice Macaulay in his judgment, for the reasons given.

The appellants have signed a very rigid contract, it is true, but they did so willingly, and, as it is legal, they have to take the consequences thereof. If we could find a simple caprice in the fact of their dismissal, it would be our duty to protect them, but it is evident that it was not so, and that they were dismissed from the employment of the company in good faith and upon reasons given by those in authority. Even if they had been injudicious, provided they were in good faith, it would be sufficient. But more than that, the learned trial Judge has found that they were properly dismissed, and we should not disturb his finding on that point, the facts being, to say the least, discussible. The appellants had the opportunity of shewing before the same officials in authority that they should not be dismissed. They failed to satisfy them.

Therefore, I am of opinion that this appeal should be dismissed with costs to be set off against the costs in the other appeal.

THE

Western Law Reporter

VOL. VIII. TORONTO, JULY 1, 1908.

YUKON TERRITORY.

MAY 21ST, 1908.

CHAMBERS.

JALBERT v. JENSEN.

Security for Costs—Nominal Plaintiff—Proof of Solvency—Onus—Affidavit—Leave to Add Real Plaintiff.

Motion by defendant for security for costs, on the ground that the plaintiff is a nominal plaintiff, having no interest in the subject-matter of the action, and being without means to satisfy costs.

M. B. O'Dell, for defendant.

F. J. McDougall, for plaintiff.

CRAIG, J.:—The material put in is the affidavit of Mr. O'Dell, the solicitor for the defendant, who testifies that on examination of the plaintiff for discovery he stated that he made no claim to the subject-matter of the action, and he is representing a third party not a party to the action. Mr. O'Dell further swears that he made inquiries from different persons in the city of Dawson who are acquainted with the plaintiff, as to his solvency, and was informed by one C. Jeanerette, an acquaintance of the plaintiff, that he was not possessed of any means to answer a judgment for costs, and that, to the best of the deponent's knowledge and belief, the plaintiff is not possessed of means or property that could be realized upon to answer any judgment for costs. No answer

is made to this affidavit by the plaintiff; but Jeanerette, who seems to be the party interested in the action, swears that O'Dell casually asked him, without indicating why he wanted the information, whether or not the plaintiff had any money, and he said he had not, meaning that he had no bank account, but that he believes the plaintiff to be solvent and perfectly able to pay his debts.

Jeanerette is the party interested in this action, and should be the real plaintiff. In his affidavit he describes how it comes about that Jalbert is put up to sue in his stead. The contest is over the staking of a placer mining claim, which was owned by one Dr. Varicle jointly with another, and mortgaged to Jeanerette to secure a debt. Varicle died, and Jeanerette, believing that owing to the death of Varicle the usual lay-over given in the estates of deceased persons would be allowed, took no steps to represent. It was afterwards discovered that the claim was not in Varicle's name, but in the name of one Cassel, and that, therefore, the usual rule of lay-over could not be applied in this case, and he found his claim had lapsed, and employed the nominal plaintiff Jalbert to stake for him.

It is contended that he should not be forced to give security because this is a forced action; in other words, the contest arises between the parties as to who had priority of staking and as to the regularity of their staking, the mining recorder refusing to give a grant to either party until their rights were determined by a protest or action, and this action is brought to establish these rights. I cannot see that that makes any difference to the rule of law which is so well determined in the several cases of Tennant v. Brown, 5 B. & C. 208; Hearsay v. Petchell, 7 Dowl. 437; Clark v. St. Catharines, 10 P. R. 205; Pritchard v. Pattison, 1 O. L. R. 37, and Cowle v. Taylor, 31 Ch. D. 34, and especially the judgment of Bowen, L.J., at p. 38.

Counsel for the motion argued that, when once the want of interest in the action was established, the onus of shewing solvency or ability to pay costs was shifted to the plaintiff. I can find no authority in any of the cases for this proposition. The onus, it seems to me, rests upon the party moving to shew both the want of interest and at least to raise a strong presumption that the plaintiff would not be able to satisfy a judgment for costs obtained against him. The only case which gives colour to the suggestion of counsel on this point is Hathaway v. Doig, 9 P. R. 91, where Ferguson, J.,

does indicate that the presumption of non-ability to pay costs by the nominal plaintiff should be answered fully and satisfactorily by him. I concur in that judgment. In this case there is no answer put in by the plaintiff at all, but the answer is made by Jeanerette, the party who is concerned and staying out of the action and allowing his nominal representative to contest the action for him.

I will allow Jalbert to put in an affidavit in answer which must be full and satisfactory in regard to his solvency. If he fails to do that, then the real party in interest in the action must be made a party plaintiff along with Jalbert or must give security in $400. He will have 10 days to file his affidavit in answer, and the defendant may forthwith proceed to examine him upon that affidavit if he sees fit.

MANITOBA.

CAMERON, J. APRIL 30TH, 1908.

TRIAL.

CALVERT v. CANADIAN NORTHERN R. W. CO.

Costs—Railway—Expropriation of Land—Action for Trespass—Offer of Compensation—General Costs of Action.

Action for $2,000 damages for trespass, or, in the alternative, for a mandamus directing the defendants to place matters in train to assess the compensation due to the plaintiff for lands taken by the defendants for the purposes of the railway.

The action was tried on 12th February, 1908, before CAMERON, J., who gave judgment for the plaintiff for the amount paid into Court by the defendants, namely, $238.50, holding that there was no trespass, and directing the defendants to place matters in train to assess the compensation due to the plaintiff for the lands taken, and reserved the question of the costs of the action until after the arbitrators made their award. Judgment having been entered on 19th March, 1908, the defendants served a notice of expropriation upon the plaintiff, offering $636 for the value of the lands taken. On 26th March, the plaintiff accepted this amount.

The plaintiff then moved for judgment on further directions and for costs.

H. P. Blackwood, for plaintiff.

C. H. Clarke, K.C., for defendants.

CAMERON, J., held, that, notwithstanding that he had held that there was no trespass on the defendants' part, the plaintiff was entitled to the general costs of the action.

Judgment for the costs of action and of this application, to be taxed to the plaintiff.

MANITOBA.

MAY 6TH, 1908.

COURT OF APPEAL.

FRASER v. CANADIAN PACIFIC R. W. CO.

Railway — Agreement with Municipality—Confirmation by Statute — By-law — Permission to Alter Grade of Streets and Construct Subway — Injury to Land Fronting on Streets—Injunction—Construction of Agreement —Work Done in Accordance with Agreement.

Appeal by plaintiff from judgment of CAMERON, J., 7 W. L. R. 734, dismissing the action.

W. R. Mulock, K.C., and C. P. Wilson, for plaintiff.

H. A. Robson and A. L. Bond, for defendants the railway company.

I. Campbell, K.C., and T. A. Hunt, for defendants the corporation of the city of Winnipeg.

The judgment of the Court (HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.), was delivered by

PHIPPEN, J.A.:—The city of Winnipeg and the Canadian Pacific Railway Co., after protracted negotiations, executed an agreement, dated 3rd December, 1903, for the re-arrangement of the company's tracks in the city. The contract was approved by by-law No. 2,790, and the agree-

ment and by-law were ratified and confirmed by Act of the legislature of Manitoba, 3 & 4 Edw. VII. ch. 64. Both will be found printed as a schedule to the confirming Act.

The works undertaken by the company were of considerable magnitude, and the agreement bears evidence that it was contemplated they would occupy some time in their completion.

At the time the agreement was made, the company's line entered Winnipeg from the east upon Point Douglas avenue, a street 66 feet wide, running east and west. The company's tracks were at that time laid along a portion of the street under the authority of city by-law No. 1,881, printed at p. 367 of the consolidated by-laws of the city. For a number of years past, while open to street traffic, the avenue had been used principally for railway and shipping purposes. A number of warehouses had been erected along its north side, east of Main street, and the company, in addition to two through traffic tracks, had laid industrial tracks upon the street for shipping accommodation. No portion of the avenue was actually closed by by-law 1,881. While the company were authorized to place tracks upon the street, the whole avenue remained open for public traffic, but in fact its utility as a street was very largely curtailed by the operations of the railway.

By the agreement of 1903 the avenue west of Main street was entirely closed and handed over to the company; east of Main street to a specified point, distant therefrom probably three-quarters of a mile, and past the locus in quo, the southerly 45 feet of the avenue, except a crossing at Rachel street, was also closed and handed over to the company, and the company were authorized to lay tracks on the northerly 21 feet of the avenue, but so as not to obstruct this portion of the street. Ex abundanti cautela, the cross-streets, in so far as they were identical with any of the closed portions of the avenue, were also closed.

The re-arrangement contemplated the raising of the company's tracks. It authorized the company to raise the grade of the avenue as the company might deem advisable, but so as "not to exceed 10 feet above the present grade of its main track on the said Point Douglas avenue." The company undertook to at once proceed with the construction of a subway at Main street, and, until the tracks were raised, to maintain a level crossing, with gates and watchmen, at

Rachel street. When the tracks were raised, the company agreed to supplant this level crossing with a subway.

The sections of the contract which were most referred to in the argument are as follows: "1. That the city gives and grants the right and privilege to the company to, in any manner and at any time the company thinks proper, re-arrange the location of its tracks upon Point Douglas avenue, in the city of Winnipeg, and re-construct the same, and construct any additional track or tracks of railway along, upon, or over any part of the said Point Douglas avenue west of the westerly limit of McArthur street produced northerly, and use and operate the same, and for that purpose, should the company think proper, to at any time raise the grade and surface of Point Douglas avenue, or of any part thereof, and tracks thereon, to such height and at such points as the company may deem advisable, but not to exceed 10 feet above the present grade of its main track on the said Point Douglas avenue. Provided, however, as to the northerly 21 feet in width of said avenue east of Main street and west of the line between lots 15 and 16 referred to in paragraph 3, so long as and to the extent that it remains an unclosed street, the right of the company to lay tracks and raise the grade shall be subject to the condition that there shall be no obstruction thereof, unless by consent of the city, without turning the street so as to leave an open and good passage for carriages, and on completion of the works placing the street in good passable condition, and the rail itself, if it does not, when the works are completed, rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction, and subject also to the condition that the company shall properly grade up the approaches into said 21 feet of the streets running thereto from the north, which the company hereby agrees to do.

"15. That the company will make and maintain a level crossing from Annabel to Rachel street across the company's tracks on Point Douglas avenue, and will provide gates and a watchman therefor. Provided, however, that when the company desires to exercise its right to raise its tracks or the grade of the said Point Douglas avenue as hereinbefore mentioned, at such point, the company will then construct for and on behalf and under the authority of the city, a subway crossing in lieu of such level crossing, the company doing the work and procuring the materials therefor at its

own expense. Such subway shall be 49 feet in width, and the character and plans thereof shall be submitted to and approved by the council. Said subway from Annabel to Rachel streets shall be constructed and completed within 4 years and 6 months after the said ratification and confirmation aforesaid. If the council and company cannot agree as to the character and plans, the question in difference shall be submitted to the Railway Committee of the Privy Council of Canada."

Thereafter the plaintiff purchased two vacant lots at the north-east corner of Rachel street and the avenue. Rachel street leads into the avenue from the north, about half a mile east of Main street, and immediately to the west of the plaintiff's property. It is 66 feet in width. Nearly opposite to Rachel street and practically as a continuation thereof, Annabel street, 49 feet in width, leads out of the avenue to the south. At the time of the agreement streets in the locality of the plaintiff's property were so arranged that traffic from the plaintiff's land must find its way to the business portion of the city across the tracks and along Annabel street, or some parallel street, or westerly for a distance at least along the avenue; otherwise (assuming Rachel street to be stopped as at present) easterly along the avenue and then by a circuitous and most inconvenient route to the north and west to Main street. As a matter of fact, the evidence shews that practically all traffic from the north side of the avenue found its way across the avenue at the nearest cross street and so to its destination along ways to the south of the tracks.

At the date of the agreement there were three tracks on the avenue at the point between Rachel and Annabel streets—two through tracks and a side track for local warehousing accommodation.

Since the agreement the company has raised practically the whole southerly 45 feet of the avenue about 6 and a half feet, entirely cutting this portion off for traffic either along or across the street. It has, to some extent, rearranged its tracks on the northerly 21 feet of the avenue, which portion of the street remains at its old level. It has removed the local track from the avenue between Rachel and Annabel streets, connecting the industrial track so severed with its main tracks at two points by steep grades, both east and west of Rachel street.

To carry out its agreement with the city the company prepared plans of a subway at Rachel street, which plans were submitted to and approved by the city, as provided by clause 15 of the contract, and work has progressed to the extent of excavating the subway, which, at present, is partly completed so as to permit of temporary use.

The subway, if completed according to the agreed plans, will be of the width specified in the contract, with a head-room of 14 feet. The excavation will necessarily render Rachel street useless as an approaching street to the avenue. To minimize the length of the grade approaches, or for other reasons appealing to the judgment of the contracting parties, the least depth possible, providing the necessary head-room, has been adopted. As the tracks are some 6 feet higher than the northerly 21 feet of the avenue, it is impracticable, without raising the avenue grade to the track level or increasing the depth of the subway, to cover all that portion of the subway crossing the northerly 21 feet of the avenue. The result is that the avenue is, and will continue, completely severed for all traffic purposes east and west at Rachel street, rendering it entirely useless to the plaintiff's property as a street to the west, and forcing his traffic, on the arrangement of the streets as they were when the agreement was made, along the avenue to the east and by the inconvenient and lengthened route above described to Main street. Of this the plaintiff complains, and seeks a mandatory injunction to compel the contracting parties to construct the subway according to what he argues are the terms of the agreement and ratifying Act, leaving the avenue open to him as a street to the west.

The permanent severing of the avenue is undoubtedly an appreciable damage to the plaintiff's property. It is not contended that the city has authority (without at least taking steps under its charter, which it has not attempted to take, and which might or might not authorize what has been done), apart from the power conferred by the ratification of the contract, to permanently sever the avenue, and it therefore becomes necessary to determine how far the completed work has been authorized by the special legislation.

By sec. 23 of the ratifying Act "By-law No. 2790 of the city of Winnipeg, set out in schedule B. hereto, is hereby validated and confirmed in all respects as fully as if the provisions of the said by-law and the said agree-

ment made a part thereof had been enacted by the legislature of this province." The agreement having thus received the force of an Act of the legislature, all powers therein assumed, or necessarily to be inferred from its provisions, are effective and binding upon private interests, private rights being fully protected by the very ample provision for compensation for damages occasioned by the works.

The first argument advanced on behalf of the appellant was, that the right of the railway to raise the grade or any part of the grade on the avenue was restricted to a raising of the whole grade for the full width of the street at the point or points selected by the company. That is, that while the company could raise a particular portion of the grade longitudinally within the limits imposed, it could not raise the southerly 45 feet, leaving the northerly 21 feet, alongside the raised portion, at the old or some other level. While this argument, which was based on a consideration of by-law 1881, of the use of the word grade in the contract, of the covenant to construct approaches, and of certain minutiæ in the agreement, was strongly urged, it did not appeal to my mind as tenable. When it was pointed out to the appellant's counsel that, carried to its logical result, such a construction would necessarily lead to the blocking of all present warehouses by their being put out of loading track level, would block the entrance to a valuable hotel, and would leave a 6-foot perpendicular approach from Main street to the northerly 21 feet of the avenue, the contention was changed to one that the company was limited to a full raising at Rachel street with an incline of the grade on the northerly 21 feet of the avenue until it reached its present level at Main street.

I must confess I can find nothing to justify this construction of the agreement. On the contrary, the agreement expressly states that the company may, for the purpose of the works or operations authorized by the earlier part of sec. 1, should it think proper, at any time raise the grade and surface of Point Douglas avenue or of any part thereof and tracks thereon to such height and at such points as it may deem advisable, but not to exceed, &c. I think the agreement means exactly what it states, in what, to my mind, is plain and unequivocal language, and that we should be straining for a false construction to hold

that "any part of the grade at any point" means the whole grade and nothing less than the whole grade at that point.

Again, sec. 15 provides "that when the company desires to exercise its right to raise its tracks or the grade on Point Douglas avenue" at Rachel street, it will construct the subway. It would be difficult to raise the company's tracks without raising that portion of the grade beneath them. When the agreement speaks of raising the tracks or the grade, it uses the word "grade" as distinguished from, not as synonymous with, "tracks," and either as embracing the whole grade, including the portion on which the tracks are laid as well as the northerly 21 feet, or as referring to the northerly 21 feet alone, thus recognizing the right of the company, at the identical point in issue, to raise either the tracks or the whole grade, a right inconsistent with the contention of the plaintiff.

It was next argued that the agreement expresses a clear intention that the northerly 21 feet of the avenue should remain open as a street, to this extent limiting the power of the contracting parties to agree as to the plans and character of the subway. In other words, that the power to construct the subway is subservient to the obligation to keep the avenue open, thus restricting the contract as empowering its severance.

While the southerly 45 feet is stopped up, the northerly 21 feet is expressly excepted from closure, and, although the company is authorized to lay tracks and raise the grade, it can only do so subject to the following express limitation: "Provided, however, as to the northerly 21 feet in width of said avenue . . . so long as and to the extent that it remains as an unclosed street, the right of the company to lay tracks and to raise the grade shall be subject to the condition that there shall be no obstruction thereof, unless by consent of the city, without turning the street so as to leave an open and good passage for carriages, and on completion of the works placing the street in good passable condition, and the rail itself, if it does not, when the works are completed, rise above or fall below the surface of the road more than an inch, shall not be deemed an obstruction, and subject also to the condition that the company shall properly grade up the approaches into the said 21 feet of the streets running thereto from the north, which the company hereby agrees to do."

It will be observed that the company is authorized to proceed immediately with certain of the works; others, which are to be undertaken, are to be delayed in their natality until the plans are approved by the city. While the company is authorized to lay tracks on the northerly portion of the avenue, it is forbidden to unnecessarily interfere with its use as a street, either in the location or construction of tracks or in the contemplated grade changes.

I cannot bring myself to believe, however, that this restriction against closing the street extends beyond the provisions of sec. 1 of the contract. The language is plain, that the company, in proceeding with stated works, is not to close the northerly 21 feet as a street, but I fail to conclude from this an intention to necessarily keep this portion of the street open as against other authorized works—works the plans and character of which must be approved by the city before they can be undertaken, and the details of which could not have been anticipated by the contracting parties when the agreement was made.

The appeal was argued as if secs. 1 and 3 should be construed as sections of an Act of the legislature. That, to my mind, is scarcely correct. The language was first used in a contract, and the intention of the contracting parties was not altered by the agreement subsequently receiving legislative sanction. The meaning must, therefore, be sought as in a contract, which contract was to depend on legislative approval for its validity, and one, therefore, the terms of which could not be altered by subsequent agreement between the contracting parties. Under such circumstances, I would not anticipate unnecessary restrictions on the manner of executing contemplated works, the particulars of which were then unknown, but which afterwards required the approval of all agreeing parties before being proceeded with. Legislative authority has been granted to carry out the intended works. One of these works is the subway, which is to be constructed under the authority of the city after the character and plans have been submitted to and approved by the council. Unless restricted by other portions of the contract, the agreement, when ratified, is a statutory authority to construct in any suitable manner, of which, I think, the council, as the natural guardians of the city's streets, are the safe and proper judges. Having regard to the local conditions as dis-

closed by the evidence, I cannot conclude that the construction of the subway as proposed is unreasonable.

This is not the case of severing an important highway. The avenue has been a street in name only, since Winnipeg became known. Carrying the traffic of a great transcontinental railway, with its surface covered with main and industrial tracks, blocked with cars loading at warehouses, and rendered dangerous by passing trains, it must have been, as pictured by witnesses, a street to be avoided rather than travelled. Under the terms of the agreement, two-thirds of the street were to be entirely stopped, and the company is given unlimited rights to lay industrial tracks on the remaining 21 feet, a strip so narrow as to be blocked by a loading car. While by sec. 1 the company is forbidden from entirely closing it by its tracks or grade changes, the authorized works have so minimized its street usefulness as to avoid any violent presumption against the authority of the city to determine that other authorized improvements may best be proceeded with at the penalty of its severance, particularly when all damages, including those occasioned by severance, are made the subject of compensation and charged against the railway.

I am unable to find in the terms of the contract any limitation on the right of the city to sever the street impliedly granted by sec. 15, should such action appear reasonable and proper in executing the authorized work. Considering the magnitude of the contemplated undertaking, and realizing the impossibility of complete anticipation at the time of the agreement, the contract should be broadly construed along those lines which empower the city to work it to an harmonious and successful conclusion.

Much that I have said applies to the next point taken by the appellant, that the subway was to be in lieu of a level crossing, and was, therefore, to be a subway to the extent that the crossing was a crossing; that it was to be a subway from Rachel to Annabel streets, whereas the subway being constructed is not a subway from street to street, a part of the distance being occupied by the necessary approaches. I cannot impose any such technical limitation on the city in approving, as authorized, the plans of the work. The language of the agreement is at most descriptive. It would be narrow indeed to hold that the agreeing parties intended to thus limit the exercise of their later judgment.

I do not concern myself with the Railway Act. Having held that the work is authorized by the local Act, and the Railway Committee having by order sanctioned its execution, and counsel for the plaintiff admitting that his claim is for an injunction alone, and it appearing that the work is not being done under the Railway Act, such a consideration would be foreign to the issue.

In view of the able and exhaustive judgment of the learned trial Judge, which I fully adopt, I have possibly discussed the issues at unnecessary length. The fact that counsel have shewn by their very full arguments the importance they attach to the question, must serve as my justification.

The appeal is dismissed with costs.

MANITOBA.

MAY 12TH, 1908.

COURT OF APPEAL.

TRADERS BANK OF CANADA v. WRIGHT.

Injunction—Interim Order—Action on Behalf of all Creditors—Injunction Restraining Debtor from Transferring his Property before Judgment—Pleading—Statement of Claim — Insufficiency—Evidence — Fraud — Parties—Fraudulent Grantor—Costs—Appeal.

In the report of this case, ante 208, it was stated that PERDUE, J.A., concurred with HOWELL, C.J.A., and RICHARDS, J.A.

PERDUE, J.A., afterwards gave his reasons in writing as follows:—

This is an action by the Traders Bank of Canada, suing on behalf of themselves and all other creditors of the defendant Archibald Wright, against him and his wife Mary Wright.

The statement of claim alleges that by an agreement in writing dated 8th September, 1906, the defendant Archibald Wright guaranteed payment to the plaintiffs to the extent of $100,000 of advances by the plaintiffs to the House Fur-

nishings Company Limited, later known as Ideal House Furnishers Limited. The plaintiffs further allege that, by an action previously commenced in the same month against the defendant Archibald Wright, they assert (in that action) that he is indebted to them under the said guaranty in the sum of $100,000, and that they seek to recover that sum in the said action. It is then alleged that prior to or at the time of taking the said guaranty the defendant Archibald Wright was the owner of capital stock in certain companies to a large amount, the names of the companies and the par value of the stock being set out in detail. The plaintiffs then charge that in or about the month of September, 1906, the defendant Archibald Wright, with the intent and design of defeating, delaying, and hindering the plaintiffs and his other creditors in the recovery of their debts, transferred, without any valuable consideration, to his co-defendant, Mary Wright, all his stock in the Tuxedo Park Company, one of the companies previously mentioned, and that he also, without valuable consideration, and with the same intent and design, transferred to her other of the said stocks, not mentioning them by name. The relief asked is that the transfers should be declared to be fraudulent and void as against the plaintiffs and other creditors of Archibald Wright; that Mary Wright should be declared a trustee for him of the stocks transferred; and that both defendants should be restrained from dealing with or further transferring the said stocks or any of them.

On the motion of the plaintiffs an injunction was granted by Macdonald, J., restraining the defendant Archibald Wright from parting with or transferring the stocks in some 9 companies until the trial of the action, and also restraining the defendant Mary Wright "from further retransferring, until the trial or other determination of this action, the stocks heretofore transferred to her by the defendant Archibald Wright in the Tuxedo Park Company Limited, the Winnipeg Saddlery Company Limited, and the Standard Trusts Company Limited, and any other of the before mentioned stocks that may have been transferred to her by the defendant Archibald Wright without valuable consideration or with the intent and design of defeating, delaying, and hindering the plaintiffs and the defendant Archibald Wright's other creditors in the recovery of their debts."

The statement of claim contained no allegation that Archibald Wright was indebted to the plaintiffs; it simply alleged that in a prior action, then pending, they asserted that he was indebted under the guaranty in the full amount thereof. There is no allegation in the statement of claim that he is indebted to any other creditor. The affidavits filed shewed that the Ideal House Furnishers Limited, on behalf of which (in the person of its predecessor) the guaranty was given, was being wound up. The guaranty upon which the two actions were founded is signed by Wright and 4 other persons. It states that in consideration of the plaintiffs making advances to the House Furnishing Company Limited, to the extent of $100,000, by discounts of negotiable securities, overdrafts, or otherwise, the guarantors jointly and severally guarantee payment in full of such negotiable securities or overdrafts or other indebtedness, that it is a continuing guaranty, that the doctrines of principal and surety shall not apply, that the guarantor shall be liable for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount due from the company to the bank, but that the bank shall not be bound to exhaust all recourse against other parties previously to making demand on the guarantors. It also declares that the intention is that the bank shall have the right to demand and enforce the guaranty in whole or in part from the guarantor whenever the principal debtor or other party or parties concerned fail to discharge any obligation they may have entered into.

There is no allegation in the statement of claim that the House Furnishings Company Limited or the Ideal House Furnishers Limited is indebted to the plaintiffs in any sum, or that there is any sum due to the plaintiffs in respect of negotiable securities discounted for these companies, or either of them, or for overdrafts or other indebtedness incurred by them or either of them. There is nothing in the statement of claim which alleges or shews that Archibald Wright is indebted to the plaintiffs or that any liability under the guaranty has accrued against him in favour of them. There is nothing, therefore, so far as that pleading is concerned, which would justify the Court in restraining him from dealing with his property. Much less is there anything in the statement of claim which would warrant the granting of an injunction against Mary Wright to re-

strain her from transferring the stocks she received from her husband, whether she did or did not pay any value for them.

The injunction must, therefore, be dissolved. At the request of counsel for the plaintiffs leave is granted to amend the statement of claim within 14 days from the entry of the order.

Counsel for the defendants urged that, as the plaintiffs will have to make out a new case if both defendants are retained as parties to the suit, the costs of the motion for injunction and of the appeal should be payable forthwith.

Under the former equity practice Archibald Wright would not be a necessary or proper party to a suit by a judgment creditor or by a simple contract creditor suing on behalf of himself and of all other creditors to set aside a transfer of Wright's property by him as fraudulent and void against the creditor or creditors: Weise v. Wardle, L. R. 19 Eq. 171; Bank of Montreal v. Black, 9 Man. L. R. 439.

In Gibbons v. Darvill, 12 P. R. 478, Rose, J., held that since the introduction of the Judicature Act the debtor as well as the fraudulent grantee should be a party to such a suit, but the reasons for so holding are not clearly disclosed in the report. In Schwartz v. Winkler, 14 Man. L. R. 197, Killam, C.J., held that in a suit by an assignee for the benefit of creditors, the debtor was not, under the present practice, a necessary or proper party to a suit to set aside a fraudulent conveyance made by him. Whether the debtor should or should not be a proper party now will depend upon the form of the suit and of the relief asked. Under the present practice all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative: King's Bench Act, Rule 219.

It has been shewn that there is another and a prior suit by the plaintiffs pending against Archibald Wright in which they are seeking to obtain a judgment against him on the guaranty. Until the statement of claim in the suit now under consideration shall have been amended, it is uncertain what relief will be claimed against him which might make him a proper party, or whether he will or will not be retained as a party. It would therefore seem proper that under the circumstances the plaintiff should be ordered to pay the defendants' costs of the motion for injunction and of this appeal forthwith.

MANITOBA.

MACDONALD, J. MAY 14TH, 1908.

CHAMBERS.

RE REID.

Solicitor—Bill of Costs—Delivery of—Application by Client for Taxation—Substituted Service on Solicitor—Practice.

Application by the executors of one Reid for an order for leave to serve substitutionally a notice of motion for an order to refer a solicitor's bill to taxation. The solicitor had rendered a bill of costs, dated 16th September, 1907, to the executors. Subsequently the solicitor, who, up to that time, had been practising in Winnipeg and had charge of the estate, left and went to Calgary. Efforts were made to serve him personally with the necessary material to obtain an order to tax the bill. This could not be done, owing to the fact that the solicitor could not be found. It was shewn that reasonable efforts had been made to effect personal service.

H. P. Blackwood, for the applicants. The Imperial Act 6 & 7 Vict. ch. 73 is in force in Manitoba. Section 37 provides that the Court has power to refer a solicitor's bill already delivered for taxation: (a) at the instance of the client within one month after the bill has been delivered; (b) at the instance of either the solicitor or the client, after the lapse of a month from the delivery of the bill, in case application for taxation has not been made by the client within the month. Here the bill was delivered in September, 1907. See Meyers v. Munroe, 4 W. L. R. 221, 16 Man. L. R. 112. As to substitutional service of notice of motion, see King's Bench Act, Rule 368, and Re Chatham Harvester Co. v. Campbell, 12 P. R. 666, where the analogous Ontario Rule is discussed.

MACDONALD, J., made an order allowing substitutional service of the notice of motion for an order to refer the bill to a taxing officer for taxation, by dispatching the notice

in a prepaid registered letter addressed to the solicitor at Calgary, and by mailing the notice of motion to the solicitor in the care of another solicitor practising in Winnipeg who was likely to know of the solicitor's whereabouts, the latter letter to have the words "Please forward" marked on the envelope.

BRITISH COLUMBIA.

WILSON, Co. C.J. FEBRUARY 20TH, 1908.

COUNTY COURT OF EAST KOOTENAY.

RE FERNIE LIQUOR APPEAL.

Liquor License Act—Renewal of License—Powers of License Commissioners—Appeal to County Court Judge—Petition under sec. 42—Right of Appeal.

Appeal by Lawson and others from a decision of license commissioners granting a renewal of a retail liquor license to Charles Farrell.

W. A. Macdonald, K.C., for the appellants.

Ross and Alexander, for the respondent.

WILSON, Co. C.J.:—This is an appeal by certain license holders at Morrissey against the decision of the license commissioners granting a renewal of a liquor license to Farrell. The appeal is not based on what might be called "an improper renewal," but is based on the fact that at the time the license was granted there were already within that license locality 3 licenses granted and issued, and that the population did not exceed 1,500, but as a matter of fact was under 100. It was contended that the original issue of the license was a nullity, and that the renewal could therefore be nothing better. Counsel for the respondent raised the objection that no one had appeared to object to the renewal, and that all the papers having been in proper form on the renewal, no appeal can lie, i.e., that on the renewal everything was in order.

It seems to me that the proper course to pursue would have been for the present appellants to have appeared before the license commissioners and there have given their evidence shewing that the full number of licenses had been granted and issued for this locality, and I think it is one of those matters that should be first dealt with by the license commissioners under a petition presented to them under the first proviso in sec. 42 to the Act. I cannot by order direct that this should be done, but I think it is the only proper course to pursue, and from that decision an appeal would lie in the usual course. That being my view, I dismiss the appeal.

BRITISH COLUMBIA.

WILSON, Co. C.J. FEBRUARY 20TH, 1908.

COUNTY COURT OF EAST KOOTENAY.

BONNELL v. HOGGINS.

Master and Servant Act, 1899—Employees of Mining Company — Appointment of Medical Practitioner — Proceedings under Statute—Meetings of Employees—Validity—Ballotting—Notice Calling Meetings—Authority—Miners' Union—Medical Fund Claimed by Rival Practitioners—Interpleader—Assignments of Fund.

Interpleader issue to determine the ownership of moneys in the hands of the Hosmer Mines Limited and in Court.

S. S. Taylor, K.C., and L. P. Eckstein, for plaintiff.

W. A. Macdonald, K.C., and Sherwood Herchmer, for defendant.

WILSON, Co. C.J.:—The Hosmer Mines Limited are a company employing a large number of men in their coal mines at Hosmer, and the parties to the issue are physicians practising at Fernie. From August, 1906, Higgins acted as physician for the men at the mine, at the request of the company, and the fact that he was so acting was communicated to the men when he met them at a meeting. That ar-

rangement continued until about 1st September, 1907, when, a union having been formed at Hosmer, a committee was appointed to consult with Higgins and make permanent arrangements as to doctor's fees. That committee carried on negotiations with Higgins and also with Bonnell and Corsan, and as a result the union decided to have a ballot taken on 30th September to decide who should be the doctor to act for the men. It must be borne in mind that the union at that time did not by any means include all the men employed at the mine, and in fact from the evidence it seems not even half. The union caused notices to be posted of the taking of the ballot, which notices were on regular union forms, and the ballot was taken on 30th September by William Reid, financial secretary of the union. The ballot was taken by Reid and one or two others proceeding with the ballots and the ballot box from place to place on the company's property, and giving each man a ballot, and having him then mark it and place it in the ballot box. Certain evidence was given shewing that Reid was to a certain extent acting in a double capacity, i.e., as returning officer and also as agent for Bonnell and Corsan. The conclusion of the voting was taken by a two hours' session in the school-house, at which very few voted. This voting, it is contended, does not come within sec. 5, ch. 43, 1899, and I think I must so find. There was not a special meeting called for the purpose of approving the appointment of a medical practitioner, as required by sec. 5, and as a matter of fact no meeting was held, and I think the taking of the ballot in the fashion described is not what was intended by the Act.

Matters then lay in abeyance until about 26th October, when a meeting was held in the school-house at Hosmer, and attended by some 30 of the men and Doctors Bonnell and Higgins, who addressed the men, and afterwards a committee was appointed to wait upon the miners' union and make arrangements for the holding of another meeting, at which the question of the appointment of a doctor should be decided. Apparently at that meeting Bonnell and Higgins agreed that the result of a meeting to be so called should determine the question. That committee attended the meeting of the miners' union and discussed matters, and no steps were taken at the meeting then held to arrange matters or to fix the date for the election. A few days later, at a meeting of some of Higgins's friends, held in his office at Hosmer, it was decided

to hold a meeting for appointing a doctor on 6th November, and that meeting was afterwards held. No further steps were taken by the committee appointed at the meeting of 26th October, and the meeting of 6th November was called by Higgins's friends, apart altogether from the miners' union, and without any agreement or consultation with them. When the meeting was called, certain officials of the union attended and objected to the meeting going on, on the ground that a vote had already been taken and the question decided, and, after some discussion, the meeting went ahead and appointed a chairman and returning officer, and a vote was taken. The union men did not all vote, as they apparently thought the vote of 30th September ended the question, but at the meeting Higgins received a majority of the workmen employed by the company.

The union men were apparently dissatisfied with this vote, and, after discussion, another meeting was called by the union, and held on 7th December. Notices were given before this meeting on the union forms, and the vote was taken and resulted in favour of Bonnell. The notice calling this meeting stated that no proxies would be allowed, and it is alleged that for that reason the meeting was not a proper one. Higgins's friends took part in this meeting, and sample ballots were prepared and distributed by his friends, shewing the voter how to mark his ballot. Neither the meeting of 30th September nor the meeting of 7th December gave Bonnell a majority of the workmen employed by the company. It is contended by counsel for Higgins, apart altogether from the other grounds, that that is fatal, and in that view I feel myself compelled to concur. At first glance, looking at sec. 5, it might be contended that the section meant a majority of the workmen present at a special meeting but, reading secs. 4 and 5 together, I think it was the undoubted intention of the legislature that it should be a majority of the workmen who should dispose of the funds which they have contributed, and not the majority of the workmen present at a meeting. Under sec. 4 the accounts may be audited by a committee appointed by a majority of the workmen, and I certainly think that the same intention is manifest in sec. 5, and that the words "either present or represented by proxy" merely represent the manner in which they can vote at a meeting. These two meetings, I think also, can be attacked on other grounds: for example, the vote of

30th September, from the mere fact that there was no meeting called and from the manner in which the ballot was held; and the meeting of 7th December, for the reason that the notice stated that no proxies would be allowed.

I am then thrown back to determine whether or not the meeting of 6th November was a proper meeting. The chief grounds of objection to that meeting are that Higgins took an unnecessary part in the meeting, which of itself I do not think a fatal objection. The second objection is that the meeting was not properly called, the notice being signed by one McFarland. It is contended that the meeting should be called by some governing body or by authorization by some meeting of the men held prior thereto authorizing the calling of the meeting. That ground does seem to me to be very serious. The meeting being specially called for the purpose of choosing a doctor, the legislature apparently intended that there should be a discussion as well as a vote, and it might well be that the ordinary miner, seeing a notice signed by one McFarland, could well esteem it a meeting not properly called and could naturally say to himself, "What has McFarland got to do with this matter anyway?" It seem to me that the company being a trustee of the funds have to take the responsibility on themselves of calling that meeting, and I think that contention is borne out by the wording of the section, which speaks of approval of the appointment of a doctor, i.e., it apparently anticipates the appointment of a doctor by some authorized person or body, and then the matter is given over to the workmen to approve of, at a special meeting prior to any payment being made out of the funds. I certainly think, as I have said before, that a meeting is called so that a full discussion may take place amongst the men themselves, and I think that any man may object to a meeting as being improperly called when it is only called by one individual workman, or even when it is called by the union, which does not by any means include all the workmen.

I think that a meeting should be called by the company to approve of the appointment of a medical practitioner they recommend, and that they, as trustees of the fund, must take the responsibility on themselves of calling and holding that meeting, and seeing that there is a full and free vote. That being my view of the matter, I can do nothing towards deciding the issue, although I have given the matter very care-

ful consideration on my part and attempted to reach some more definite conclusion. I do not think the assignments put in as exhibits can affect the point, as the fund can only be disposed of by the company through one channel.

There will be no costs of the issue.

BRITISH COLUMBIA

CLEMENT, J. MAY 11TH, 1908.

TRIAL.

ROYLANCE v. CANADIAN PACIFIC R W. CO.

Master and Servant—Action for Personal Injuries—Breach of Statutory Duty on Part of Railway Company—Improper Couplings — Contributory Negligence — Volens — Quantum of Damages.

The plaintiff was a switchman in the employ of the defendants, and on 6th November, 1907, had his hand caught between the couplers of two cars while endeavouring to make the coupling, and in consequence lost the thumb of his right hand. The coupling in use was known as the old link and pin coupler. By the Railway Act, R. S. C. 1906 ch. 37, sec. 264, sub-sec 1 (c), the railway company were required to use automatic couplers.

The defendants relied on the doctrine of volens and also alleged contributory negligence on the part of the plaintiff.

S. S. Taylor, K.C., for plaintiff.

W. A. Macdonald, K.C., for defendants.

CLEMENT, J.:—In this case the defendants have been guilty of a clear breach of the statute in using cars without automatic couplers. Apparently the idea of the legislature, following what we all know was an agitation on the part of railway employees against them, was that these link and pin couplings of the early days were at best dangerous

It therefore comes down to a question of whether or not there was contributory negligence on the part of the plaintiff; I assume that the defence of volens and of contributory negligence is open to them. As far as volens is concerned, I certainly cannot hold that an inexperienced young brakesman like the plaintiff, coupling for the first time with these link and pin couplings, can be said to have agreed to run

that risk in connection with his employment with the defendants. I find as a matter of fact that he was not volens, as that term is used in the cases. And I find as a fact that he was not guilty of contributory negligence. It seems to me that to say in doing what he did there he was guilty of contributory negligence would be to saddle on all these men in these dangerous employments the risk in almost every instance. While there is some discrepancy in the evidence as to how near the engine was, there is no doubt that his idea was that he had time to make that coupling and get out before the engine came down on him. At the most there was an error of judgment, and I do not think it was such an error that I can call it contributory negligence.

With regard to the amount, the plaintiff is entitled to recover for the pain and suffering incurred and the expense he was put to. There is no evidence that there was any. He is entitled to recover for the loss of his earning power through life owing to the loss of the thumb of his right hand, to damages for the fact that he has to go through life not as good as other men are; he goes through life with a sense of disfigurement; that I think is an element for the Court to take into consideration as well as in the case of a jury, and I do not think I am putting too high an estimate on life and limb when I say the value to a man in his position of the thumb of his right hand is $1,500.

Judgment for the plaintiff for $1,500 with costs.

BRITISH COLUMBIA.

HOWAY, Co. C.J. MAY 21ST, 1908.

COUNTY COURT OF WESTMINSTER.

RE NEILSON.

Executors and Administrators — Official Administrator — Power to Sell Land of Intestate—No Necessity for Order —Official Administrators Act—Amending Act, 1900—Intestates' Estates Act.

Application by the official administrator for an order for the sale of land of Nels L. Neilson, a deceased intestate.

J. R. Grant, for the applicant.

HOWAY, Co. C.J.:—Until the statute of 1900, ch. 27, was enacted, an official administrator, by the order appointing him in any case, became the administrator of "all the goods, chattels, and credits of the deceased:" R. S. B. C. ch. 146, sec. 8. He had as such administrator no larger powers than any other administrator; having, as the same section enacted, "the same rights, duties, and liabilities . . . as if letters of administration had been granted to him, in the ordinary course, of the personal estate of the deceased."

The Official Administrators Act, R. S. B. C. ch. 146, did not then deal with the real estate of the deceased. If a sale of the deceased's lands became necessary or expedient, the official administrator, like any other administrator, had to apply to the Court, under the Intestates' Estates Act, R. S. B. C. ch. 106, and the Court, by sec. 3, was empowered to direct him to sell or otherwise deal with it under proper restrictions and safeguards.

The Intestates' Estates Act recognizes that the official administrator has no power to deal with anything but the personal estate.. In the interpretation clause, it is enacted that "'official administrator' shall mean an official administrator to whom a grant has been made of letters of administration to the personal estate and effects of an intestate.'

In this state of the law, the Act of 1900, ch. 27, was passed. By it, the official administrator, when appointed, is the administrator of the deceased's "estate," which term, as defined in the interpretation section, includes real as well as personal estate. The underlying idea of the Act was, I take it, to place the official administrator in the position of a trustee of the deceased's estate with the fullest powers. A comparison of secs. 5, 6, 7, and 8, of ch. 146, with the sections substituted by the Act of 1900, will shew the change clearly.

Section 8, as enacted in 1900 by ch. 27, provides that the order appointing him gives to the official administrator "full power to lease, sell, and convey the land of the deceased, or any part thereof, or any interest therein, and 'land' for the purpose of this section shall mean everything included in the word 'estate' as defined for the purposes of this Act, except goods, chattels, and credits." These words are certainly very wide.

In my opinion, the official administrator by this Act becomes, when appointed, an administrator sui generis: the

provisions of the Intestates' Estates Act, as regards the sale of land, are no longer applicable to him.

As he has now "full power to sell and convey the land of the deceased," I cannot understand what power in that behalf exists outside of him. Stronger words could hardly have been chosen by the legislature to indicate that henceforth the official administrator could, like a trustee so empowered, sell the land of the deceased without any order from the Court.

Holding these views, I can make no order on this application.

BRITISH COLUMBIA.

HUNTER, C.J. MAY 28TH, 1908.

TRIAL.

REX v. LABOURDETTE.

Criminal Law—Indictment of Prisoner for Concealing himself with Intent to Escape from Prison—Not an Offence—Criminal Code—Indictment Quashed—Plea of Guilty Struck out.

Indictment of prisoner for "concealing himself with intent to escape from the penitentiary" at New Westminster on 28th May, 1908.

Prisoner, undefended, on being arraigned, pleaded guilty.

McQuarrie, for the Crown, moved for sentence.

HUNTER, C.J.—Under what section of the Code are you proceeding?

McQuarrie.—Section 72 makes it an attempt for any one having the intent to commit an offence to do any act to accomplish his object.

HUNTER, C.J.—But the next sub-section shews that the criminal act consists in attempting to commit an offence, and doing a thing with intent to commit an act is not necessarily enough to constitute an attempt.

McQuarrie.—The Code does not require that an indictment should use technical language; it is enough if it informs the accused of that with which he is charged: sec. 852.

HUNTER, C.J.—If he is charged with a criminal offence. But there is nothing in the Code making it an offence in itself for a prisoner to conceal himself with intent to escape. The only offence created is that of attempting to escape, and there is an obvious distinction between doing a thing with intent to commit an offence and attempting to commit the offence. For instance, A. may load his gun with the declared intention of shooting B. whenever he may meet him, but, if he does not take his gun with him, it would be vain to pretend that he had attempted to shoot B., or, if he bought poison with the intention of killing B. but did nothing more, it would be impossible to say that he attempted to poison B. So, if a prisoner conceals himself with the intention of escaping, that may or may not be sufficient evidence of an attempt according to the circumstances, but it is not an offence in itself. For instance, if the prisoner (while locked up in his cell) hid himself under his bed with the intention of escaping, it would, in my opinion, be an extraordinary thing to say that he had attempted to escape; while, on the other hand, if he were found concealed near an open gate awaiting a chance to slip past the guard, that would be enough to warrant a conviction for an attempt.

The plea of guilty will be struck out, and the indictment quashed, on the ground that it does not state any offence, but only a fact which might or might not be sufficient according to the circumstances to prove an offence.

There is, of course, nothing to prevent the Crown from preferring an indictment for an attempt.

BRITISH COLUMBIA.

HUNTER, C.J. MAY 28TH, 1908.

CHAMBERS.

PARRAT v. CHEALES.

Notice of Trial—Regularity—Action Transferred to Supreme Court from County Court—Order Transferring—Time of Taking Effect—Filing—Entry—Service.

The action was brought in the County Court of Westminster to recover $140 under an agreement for the sale of land. The defendant counterclaimed for $3,000 damages and for rescission of the agreement. As the counterclaim was beyond the jurisdiction of the County Court, an order was made by a County Court Judge on 8th May, 1908, on the application of the defendant, under sec. 72 of the County Courts Act, transferring the action to the Supreme Court. The order was drawn up by the defendant's solicitor and approved by the plaintiffs' solicitor on the 8th May, and was then forwarded to the County Court Judge at Vancouver for signature, and was received by the registrar at New Westminster on 12th May.

Plaintiffs' solicitor filed and served notice of trial in the Supreme Court on the 13th May for the assizes beginning on 26th May, but the defendant's solicitor did not enter or serve the order transferring the action until 14th May.

A summons was issued by defendant's solicitor on 18th May to set aside the notice of trial as premature and inadvertently served, and, being adjourned for hearing before the Judge presiding at the assizes, was heard by HUNTER, C.J., on 26th May, 1908.

W. N. Bole, for the defendant.

Kennedy, for the plaintiffs.

HUNTER, C.J.:—The order transferring the action to the Supreme Court was effective as soon as pronounced, as is shewn by the fact that as soon as pronounced the time for appeal began to run. It was, moreover, filed in the registry on the 12th, and, although not served until the 14th, I think the Supreme Court became seised of the action the

moment the order was pronounced, and that, therefore, the notice of trial was not premature, although served on the 13th.

ALBERTA.

HARVEY, J. MARCH 25TH, 1908.

TRIAL.

CLARKE v. MOORE AND SIMPSON.

Mechanics' Liens—Building Contract—Extras—Enforcement of Lien—Time of Registering — Time when Last Work Done—Trifling Character of Work — Work Done not Colourably, but in Good Faith—Time of Bringing Action and Registering Certificate of Lis Pendens—Computation of Time—Promissory Note Given for Part of Contract Price of Work—Negotiation by Lienor—Extinguishment of Lien pro Tanto—Agrement for Settlement of Claim—Waiver—Estoppel — Land Enjoyed with House—Quantity of—Interest—Improvements—Occupation Rent.

Action to enforce a mechanic's lien.

W. E. Payne, for plaintiff.

J. Carlyle Moore, for defendant Moore.

J. L. Crawford, for defendant Simpson.

HARVEY, J.:—The defendant Moore was the owner of a certain parcel of land in the town of Red Deer, and entered into an oral agreement with the defendant Simpson to erect thereon a house to the satisfaction of Simpson, and to sell him the land and house at an agreed price for the land and the cost of the house. The defendant Moore then entered into an oral contract with the plaintiff for the construction of the house for the sum of $2,750, payable in instalments at certain stages of construction. The house was built according to contract, and certain extras done, for which the plaintiff claims $114. There is no dispute as to the extras or as to the price, but the defendant Moore denies that the extras were ordered by him, and disputes his liability. In view of the contract between him and his co-defendant, it

would no doubt have appeared to them of little consequence which one ordered the extras, and in the conclusion I have come to it is also not very material, but I find the fact to be that the extras in chief part were ordered by defendant Moore, and as to the rest were authorized by him so as to render him liable. The plaintiff gives credit for $300, $52.07, and $35, making a total of $387.07, and claims a balance of $2,476.93 with interest, and on 12th December, 1907, he registered a mechanic's lien, and on 11th January, 1908, a certificate of the commencement of this action, which is brought to enforce such lien.

The only dispute as to the amount is with reference to the amount of the account of one Reinbolt for stone for which defendant Moore claims credit. Plaintiff admits that it has not been paid, and that Moore told him not to pay it, but that he (Moore) would settle it. There was no evidence, however, that it had been settled or that Reinbolt was willing to release the plaintiff, and, under these circumstances, I do not see how credit can be allowed for it.

The right to the enforcement of the lien is disputed on several grounds. It is alleged that it was not filed in time. The last work was done on 14th November, which was well within the 31 days allowed by the Act, but it is admitted that this work was not very considerable, and consisted only of fastening the hot-air registers in place and painting them, and that no work had been done before that for about a week. Authorities were cited to shew that work or materials of a trifling character would not keep a lien alive. It is to be observed that most of the authorities relied on for this proposition are cases in which after the lien has actually expired some trivial work has been done for the purpose of reviving it. It appears to me that the true principle as applicable to this case is stated by Irving, J., in Sayward v. Dunsmuir, 11 B. C. R. 375, at p. 390: "If the material was supplied in good faith and for the purpose of completing an order previously given, and not colourably to revive the lien, the delivery of such material would extend the time for filing the lien in respect of the earlier items." And to much the same effect by Macdonald, J., in Steinman v. Zoscuk, 4 W. L. R. 575: "Although such materials and work were of a trivial character, yet, as they were necessary for the proper completion of the building, I must hold that this work was done in good faith, and not colourably to revive the lien." In the present case there

is no doubt that the work, though inconsiderable, was a part of the contract, and something which the owner would have insisted on being done before accepting the work as complete. It was done in perfect good faith, and, in my opinion, constituted the completion of the work within the meaning of the Act.

The registrar's certificate shews that the affidavit of lien was registered at 11 a.m. on 12th December, and the certificate of action at 11.30 a.m. on 11th January, and it is contended that this is not within the time prescribed by the Mechanics' Lien Act, ch. 21 of 1906. Section 35 provides that "every lien shall absolutely cease to exist after the expiration of 30 days after the filing of the affidavit . . . unless the claimant in the meantime shall have instituted proceedings to realize his lien . . . and a certificate thereof . . . is duly filed . . ." There is no doubt that, measured in minutes, more than 30 days elapsed before the filing of the certificate of action, but I see no reason why the day should be divided into minutes. In 13 Cyc. 263, "day" is defined both at common law and by statute as meaning the 24 hours from midnight to midnight, and while for certain purposes fractions of a day, even the actual minutes, are to be taken into consideration, e.g., in considering priorities between registered instruments, I see no reason why the general rule should be departed from here. Quirk v. Thompson, 1 Terr. L. R. 159, though not actually deciding the point, indicates that the view I have expressed is the correct one for such a case as the present. A reference to sec. 13 seems to me also to support this view. It provides that "every lien . . . shall cease to exist after the expiration of 31 days . . . after the claimant has ceased to work thereon . . . unless the necessary affidavit of lien is filed." If the view contended for were correct, the actual minute and not the day when the work ceased would be the point of commencement of time. I never heard of such a contention being made, and it appears to me that the result would be so impracticable as not to be worthy of consideration.

It appears that a note for $500, with interest at 8 per cent., payable in 3 months, was given by the defendant Moore to the plaintiff on 28th August, in part payment of the amount then due. This note was discounted by the plaintiff with the Merchants Bank, and when it fell due on 2nd December was redeemed by him.

It is contended that the taking and negotiating the note destroyed the lien at least to the extent of the amount of the note. It is not urged that the taking of the note waives the lien because sec. 7 distinctly provides that it shall not have that effect, but it is contended that the negotiation of it puts an end to the lien. Provisions similar to sec. 7 are contained in the Acts of various provinces, but they seem in all cases to be of comparatively recent date, but before this enactment the mere taking of a note did not necessarily waive the lien. It did so only when the note was taken in payment or satisfaction. Wallace on Mechanics' Liens, at p. 149, states: "Without the section it would be a question of fact in every case whether the note was taken in payment of the account. If the note was taken in payment, the lien was gone. If the note was not taken in payment, it amounts to no waiver." He also states on the following page, on the authority of Massachusetts cases, that the fact of negotiation will not take away the lien, provided the claimant has paid it and is the holder at the commencement of proceedings. Likewise Phillips on Mechanics' Liens, at p. 395, says: "It has been argued that, although the acceptance of negotiable paper is not a waiver of the lien, yet a negotiation of it operates as an extinguishment. This argument has not been generally assented to. On the contrary, it has been almost universally held that the negotiation produces no other effect than to suspend the right of the mechanic to sue until the instrument is returned to him unpaid." These propositions do not appear to be in accord with the decision in Edmonds v. Tiernan, 21 S. C. R. 406, in which it was held that the plaintiff, who had taken a note for the amount of his claim which he had negotiated, had thereby lost his lien, notwithstanding that the note had been dishonoured and taken up by him. It appears to me that that judgment might be based on one of two grounds, either that the note was payment, and that, if the negotiation was material, it was so, as establishing that fact, or on the ground that upon negotiation of the note there ceased to be any debt due to the mechanic, and consequently nothing to support the lien, and that, having fallen, it became extinguished and could not be revived by the subsequent dishonour of the note. I find myself quite unable to tell from the reasons given what was the ground on which the judgment was based. The last sentence is: "Had the note not been negotiated by the

appellant, different considerations might have prevailed," which would seem to indicate that it was considered that the mere giving of the note might not have been deemed a waiver or extinguishment of the lien, though the reasons given do not make clear what difference the negotiation makes. It is, however, quite certain that no such provision as is contained in sec. 7 was contained in the Act then under consideration, and the decision of the Court appealed from, reported in 2 B. C. R. 82, seems to go on the ground that the negotiating of the note was a treating of it as payment, citing Bunney v. Poyntz, 4 B. & Ad. 568, where, at p. 573, Denman, C.J., says: "It was insisted in argument that Davis, the agent of the vendor, having taken in payment for the hay the promissory note of the vendee and negotiated it with the plaintiffs, and that note being outstanding in their hands, that was as against the vendee substantially a payment to him, and he could have no right to retain the hay. We think that argument right, and that the defendant, under the circumstances of the case, must be considered as having been paid for the hay and can have no right to retain it." In National Supply Co. v. Horrobin, 4 W. L. R. 570, Mathers, J., held that the effect of a provision similar to sec. 7 did not do away with the authority of Edmonds v. Tiernan, and that the discounting of the note still extinguishes the lien. In Swanson v. Mollison, 6 W. L. R. 678, my brother Stuart questions the correctness of this decision. I do not think it necessary for me to decide this point. If Edmonds v. Tiernan rests on the view that the negotiation of the note establishes the fact of payment by the note, I think that it is not now applicable. It appears to me that sec. 7 now clearly settles that question, and the taking of a note is not, under any circumstances, to be deemed payment. If it is to be supported on the other ground I have mentioned, I do not think it applicable to the case before me. In that case, as well as in National Supply Co. v. Horrobin, the note was for the full amount of the claim, while in the present case the note was only a part payment. That being the case, there was always in this case a claim on the part of the plaintiff to support a lien, and, such being the case, there never was any extinguishment of it, and when the plaintiff comes to enforce it, he is, in my opinion, entitled to enforce it for the full amount due him.

Another objection was that an agreement was made with the plaintiff for the settlement of this claim in another way, and that he thereby waived or is estopped from claiming a lien. There were, no doubt, negotiations looking to a settlement, but the only proposition which the evidence satisfies me that the plaintiff assented to was one involving the payment by defendant Moore of two notes for $500 each on another house, which he was never able to do, and I find that there never was any concluded agreement, and consequently nothing to prevent the plaintiff from claiming his lien.

There was some question raised of the quantity of land to which the lien should attach, there being two lots, though the house apparently is situated on only one. As both of the lots were purchased by the defendant Simpson for his use with the house, it appears to me that the definition of the land affected by the lien in sec. 4 as the land "occupied thereby or enjoyed therewith," includes the two lots, and the lien applies to both.

I find, therefore, that the plaintiff is entitled to a lien for the amount above mentioned against the house and lots.

It was admitted by defendant Moore that he was liable to plaintiff to pay interest at 8 per cent. from the dates when the payments fell due. I find, therefore, that the plaintiff is entitled to judgment against defendant Moore for the balance due as above set out with interest at 8 per cent. on $500 from 3rd August last, $600 from 28th August, $750 from 3rd October, and the balance from 14th November, when the last payment fell due on the completion of the work. The defendant Simpson has shewn that he has paid to his co-defendant or expended in improvements on the property the sum of $750, including $35 for insurance now current, and asks that, in the event of a sale of the property, he be reimbursed this amount, together with his costs, out of the proceeds after payment of the plaintiff's claim. This claim is not disputed by his co-defendant, and I therefore give judgment in his favour as asked. The defendant Simpson has, however, been in occupation since the completion of the house, and should be charged for use and occupation. There is no evidence as to the rental value, but, having in view the price and also considering the fact of the defendant Simpson being deprived of the use of the moneys paid on the purchase price, I fix $20 a month as a fair amount to be de-

ducted. I think also he is entitled to a personal judgment against his co-defendant for his costs of this action, since he is in no way at fault, and it is through the default of his co-defendant that such costs have been occasioned. As the amount due to the plaintiff is ascertained, there appears to be no necessity for a reference.

The defendant Moore will have 3 months from the date of the clerk's certificate of taxation of costs to pay this amount, for which plaintiff is found entitled to a lien, and the costs of this action. In the event of default, application may be made to a Judge for an order for sale.

ALBERTA.

HARVEY, J. MARCH 25TH, 1908.

TRIAL.

CLARKE v. MOORE AND GALBRAITH.

Mechanics' Liens—Building Contract—Extras—Enforcement of Lien—Time of Registering—Time when Last Work Done—Trifling Character of Work — Necessary Work—Delay for Defendant's Benefit — Personal Liability of Owner—Judgment.

Action to enforce a mechanic's lien.

W. E. Payne, for plaintiff.

J. Carlyle Moore, for defendant Moore.

J. L. Crawford, for defendant Galbraith.

HARVEY, J.:—The facts in this case are very similar to those in Clarke v. Moore and Simpson, ante, the houses being built at the same time and under similar conditions. The same defences were raised, and I shall only deal with the points of distinction.

It was admitted by the defendant Galbraith that he was personally liable for the extras, which amounted to $382. The contract price of the house was $2,400, and the only credit to be allowed is an account for electric fittings supplied by the defendant Moore for $37.39, leaving

the net amount due under the contract $2,362.61. This was payable $500 on 24th June, $500 on 28th July, $600 on 28th August, and the balance on 14th November, when the work was completed, and, on defendant Moore's admission, these sums should bear interest at 8 per cent. from the respective dates when they were payable.

As in the other case, the last work, which was very trifling in character, and consisted of the erection of steps at the back verandah, was several days after any other work was done, and plaintiff admitted that the delay was for the purpose of giving defendant Moore a little longer time to arrange for payment without losing his lien. It was urged that by plaintiff's own admission this was done for the purpose of keeping the lien alive and cannot be taken advantage of. I cannot agree with this contention. The delay was an honest one for the defendant's benefit, and the work was necessary, and I see no reason why it should not be considered the starting point for the 31 days fixed by sec. 13. It was also suggested that this work was part of an extra, and that, therefore, the time for the lien for the contract price was gone. I am not by any means clear from the evidence that it was part of an extra, but, even if it were, I fail to see any difference. It is the doing of work that gives the lien, and under sec. 13 it does not cease until "after the expiration of 31 days . . . after the claimant has ceased from any cause to work thereon."

I therefore find that the plaintiff is entitled to a lien for $2,362.61 and $382, for, though the defendant Galbraith admits his liability for the extras, there is no doubt the work was done with the knowledge and approval of his co-defendant.

There will be 3 months after the clerk's certificate of taxation of costs in which these sums and the costs of this action may be paid, and in the event of default an application may be made to a Judge for sale. Though no claim was made in the pleadings against defendant Galbraith for a personal judgment, it is pointed out that by sec. 24 the plaintiff is entitled to such judgment.

There will therefore be judgment against defendant Moore for $2,362 and interest as above mentioned, and against defendant Galbraith for $382 with costs of action.

ALBERTA.

HARVEY, J. APRIL 7TH, 1908.

TRIAL.

ROSS BROTHERS LIMITED v. GORMAN.

Mechanics' Liens—Building Contract—Death of Contractor—Payments by Owners Directly to Mechanics—Payment of Full Amount of Contract Price—Limitation of Liability of Owner — Alberta Mechanics' Lien Act, secs. 19, 32 — Time of Attachment of Lien—Payments to Contractor—Prejudice to Existing Liens—Costs.

Consolidated action in which 6 different plaintiffs sought to enforce liens for work done and materials supplied, to the amount in all of about $1,200, for the construction of a building erected on defendants' land.

O. M. Biggar and H. H. Parlee, for plaintiffs.

C. F. Newell, for defendants.

HARVEY, J.:—The contract was let to one R. A. Elliott for the sum of $5,870. Elliott died during the construction, and, by arrangements made with his representative, the owners paid the wages after his death directly to the men. The result was that when the building was completed there were payments made by the owners to the amount of $6,253.92, or nearly $400 more than the contract price.

The defendants' defence is that, having already paid the full amount of the contract price, they are, by the terms of the Mechanics' Lien Act, freed from any further liability.

The registered owner is Robert Gorman, and the defendant Sam. J. Gorman is an unregistered part owner, and is also a member of the firm of Gorman, Clancy, & Grindley, who supplied a considerable quantity of material for the construction of the building, and one of the payments made by the owners is the sum of $942.78 paid to that firm, or in reality paid to the defendant Sam. J. Gorman himself, to whom the firm charged the goods supplied some considerable time after the contractor's death. I had some doubt whether I could treat this payment as a good payment on

account of the contract, without such evidence as I would feel justified in giving the firm judgment on in an action for the amount against the estate of the deceased contractor. However, though the point was suggested by me, as it was not pressed by counsel, and as no evidence was given to shew that any of the payments were not properly attributable to the construction of the building under the contract, I shall assume them all to be so. Attention was called, however, to the discrepancy between the contract price and the real cost of the building. Before the contractor's death, three payments were made, two of $2,236 and $1,201, to the contractor for work and material as shewn by the architect's certificates of the value of $2,630 and $1,413 respectively, the payments being and being intended to be to the extent of 85 per cent. of the amount earned, in accordance with the terms of the contract. The other payment was for $335, which from the architect's evidence was not more than an 85 per cent. payment. These payments were made in December, January, and April, and no further payments were made until after the contractor's death, which took place on 3rd May, and whether work was proceeding does not appear. The 15 per cent. held back by the owner on these payments would be $665, against which no claim has been made, as all of the work and materials done and furnished by the plaintiffs herein were done and furnished at a later period. The actual cost of the building, or perhaps more correctly speaking the actual worth of the building, having reference to the work and material, would be the sum of $665, and the $1,200 claimed by the plaintiffs herein or $1,865 over and above the amount actually paid by the owners, which amount, as has been shewn, is itself nearly $400 more than the contract price, There seems to be only one of two conclusions, either the payments made by the owners were not proper payments within the proper scope of the contract, or the contractor, if he had completed the contract and paid all of his liabilities, would have been out of pocket at least $2,265 on a contract of $5,870, and perhaps considerably more. The Mechanics' Lien laws in some of the United States recognize such a condition of affairs by rendering the owner liable through the lien for the full value of the work and material, regardless of the contract price. The principle of the Mechanics' Lien Acts is that the person who receives the benefit shall be responsible for the cost, and the laws

mentioned simply carry the principle to its logical conclusion, and at the same time, to some extent at least, remove the necessity for dishonesty or honest disregard of obligations on the part of contractors by rendering it of no advantage to an owner to let a contract for a sum less than a building can be honestly constructed for. The policy of the law, however, is for the legislature, and the Alberta Act does not carry the principle as far as this, but limits the owner's liability to the amount of the contract price. Section 32 provides that "no lien, except for not more than 6 weeks' wages in favour of labourers, shall attach so as to make the owners liable for a greater sum than the sum owing and payable by the owners to the contractor." Notwithstanding this section, Mr. Justice Stuart held, in Swanson v. Mollison, 6 W. L. R. 678, that under certain circumstances an owner, having paid the contractor in full, might still be liable on a lien. In a later case, Breckenridge and Lund v. Travis, decided only a few days ago, and not yet reported, Mr. Justice Beck dissented from the view expressed in Swanson v. Mollison. It is pointed out in Swanson v. Mollison that no account is taken of sec. 19, which is as follows: "If more than one suit is commenced in respect of the same contract, the owner or contractor shall apply to have the causes consolidated, and failing to do so he shall pay the costs of such additional suits. Save as hereinafter mentioned, the owner complying with the provisions of this Act shall not be liable for any greater sum than he has agreed to pay by contract." The "save as hereinafter mentioned" appears to refer to sec. 28, under which, under certain conditions, the owner may be made liable for costs in addition to the amount of the contract, but why the sentence should have been made a subsidiary part of a section dealing with costs, to which it makes no reference, seems a little hard to understand; assuming it to have a general and absolute application, I fail to see how it adds anything to sec. 32. It is the contract price that fixes the amount owing and payable, and when the contract price is paid according to law the sum owing and payable is wiped out. It was argued that sec. 32 is not of general application, but only applies to liens in favour of labourers, that in the original roll there is a comma after the word wages, and that the section should be read as follows: "No lien in favour of labourers, except one for not more than 6 weeks wages, shall attach,", &c.

It is true also that in the British Columbia Act, of which ours appears to be almost an exact copy, the punctuation is as stated. It is, however, a fact that the Territorial Ordinance repealed by the present Act contained a section of the same purport, without the exception, of general application, sec. 10 being as follows: "Save as herein provided, the lien shall not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor." In view of my opinion that secs. 19 and 32 are of practically the same effect if the latter is given a general application, I do not consider it necessary to decide whether the consideration of punctuation or that of the similar repealed section should be given greater weight in construing the section.

The two cases above mentioned are, as far as I am aware, the only ones in which the owner's liability under conditions similar to the present have been considered. The law in British Columbia, however, has been in force for a considerable time, and one would expect to have had the matter considered then. Section 19, but for the exception of the second sentence, is in the exact words of sec. 14 of the Revised Statute of 1898, and sec. 32 is found in the amendment to the Revised Statute of 1900, as sec. 22. In British Columbia Mills v. Horrobin, 12 B. C. R. 426, the facts were, as here, that the amount of the contract had been overpaid, but the full Court, consisting of 3 Judges, gave effect to the material man's lien. The only question which is considered in the judgments is whether the material man had been paid. In a later case of Lemon v. Dunsmuir, 5 W. L. R. 505, the full Court, consisting of the other 3 Judges of the Supreme Court, upheld the lien claimed, the only point considered being, as in the former case, the question of payment to the claimant. It is not stated whether the contract price had been paid in full, but, unless it had been, there seems to be no explanation of the declaration by the Court of the hardship caused the defendant. With such eminent counsel as Davis, K.C., and Peters, K.C., arguing these appeals for the owners, it may be assumed that no possible ground of defence was overlooked, and from the silence of the reports on the point now under consideration it seems to me reasonable to think it must have been decided explicitly in some earlier case, but I have failed to find the report of any such case. These authorities, however, unquestionably decide that the owner may

be called upon to pay a second time for the same service under a statute almost identical in terms with ours, and I agree with this conclusion.

Section 4 of our Act provides that "every contractor, sub-contractor, labourer, and furnisher of material doing or causing work to be done upon or placing or furnishing any material to be used in the construction in whole or in part of . . . any building . . . shall by virtue thereof have a lien or charge for the price of such work and the placing or furnishing of such materials upon such building . . . and the land, premises, and appurtenances thereto occupied thereby or enjoyed therewith, but limited in amount as hereinafter limited." The limitation referred to at the end of the section is evidently that provided by sec. 8, which is : "Such lien shall be limited in amount to the sum actually owing to the person entitled to the lien." In the repealed Ordinance this limitation was contained in the section giving the lien, the words being "limited in amount to the sum justly due to the person entitled to the lien." By later sections it is provided that the lien shall cease to exist unless certain steps are taken within specified times by way of registration and bringing of action. There is no question about these steps having been taken in the present case.

My attention was called to Edmonds v. Tiernan, 21 S. C. R. 406, as an authority for the proposition that the lien does not attach until the steps mentioned are taken. When a lien attaches depends altogether on the words of the statute authorizing it, and, whatever were the words of the statute then under consideration, I see no room to question the matter here. The Act states that the claimant shall have a lien or charge by virtue of doing the work or furnishing the material, and certainly the declaration that it would cease to exist, as stated in sec. 13, unless registered within the prescribed time, involves the previous existence. In Smith v. Sissiboo Pulp and Paper Co., 36 N. S. R. 348, affirmed on appeal to Supreme Court of Canada, 35 S. C. R. 93, the Court held, under a section in the same terms as ours, that the lien commences when the goods are placed or furnished.

The amount secured by the lien will change, of course, from time to time as new work is done or material furnished and payments are made, as it may under a mortgage according to the amount advanced or the amount paid. Now the

statute having given this charge in absolute terms, limited only by the amount owing to the claimant, is there any other provision of the Act which takes it away or further limits it? In many lien Acts, as in the repealed Ordinance, there is a provision authorizing payments by the owner up to a certain percentage of the value of the work done, and making him liable only as to the remainder, but there is no such provision in this Act. In other Acts, as in the British Columbia Act by amendment of last year, and in our own now by amendment passed a few weeks ago, there is a limitation of the owner's liability to the amount remaining unpaid when a notice is given to him by the claimant, but before this amendment there was no such provision in our Act. Apart from secs. 19 and 32, sec. 17 seems to be the only one furnishing any such limitation, which provides that the owner may insist on receipted pay rolls of labourers before paying, and making him liable notwithstanding payments made to the contractor without such receipts. It may be said that this impliedly authorizes payments in all cases except as against the claims for wages. This argument does not appeal to me with very much force, in view of the other provisions of the Act, and of the history of this provision. Section 17 is a copy of sec. 12 of the British Columbia Revised Statute, which statute gave no lien for the furnishing of materials. As I have indicated, it did not protect the owner, as some Acts did, by authorizing payments of a certain percentage, or by prescribing notice of lien, but made this provision instead. When, in 1900, provision was made for a lien for materials, no such further provision was made, and our Act has simply taken the provisions as they stood. It appears to me, therefore, that this section gives no assistance. Now do sections 19 and 32 free the land and the owner when payments have been made to the contractor regardless of existing liens? As I have said before, these sections, in my opinion, limit the owner's liability to the contract price, and if he gets a contractor to undertake a work for less than it can be honestly done for, nevertheless he cannot be made liable for any excess over the contract price, and it appears to me that that is all that is involved in them. The British Columbia Act requires particulars of the contract and the work to be done to be filed in a public office where persons dealing with the contractor can have access to it. This measure of protection is not provided by our Act, but, nevertheless, the

limitation of liability is imposed, and merchants, mechanics, and labourers must take the increased risk in dealing with the contractor. The limitation of liability under a mortgage is the amount secured by it, and the limitation of liability on a promissory note is the amount promised to be paid, but a payment to the original mortgagee or payee after assignment would not discharge the mortgagor or maker. The payment to have that effect must be made to the person entitled to receive it. When a lien attaches, the land, and thereby the owner, becomes directly liable to the lien-holder, and the situation of the owner, contractor, and lien-holder appears to me to be much the same as that of the maker, payee, and indorsee of a note. If the contractor pays the lien-holder, he has a right to recover from the owner, but the lien-holder, having been given a direct claim by his lien, is entitled to be paid by the owner. If the owner does not pay the contractor, there is no doubt the lien-holder can enforce the payment from the owner, and thereby discharge him from his payment on the contract. Such being the case, it appears to me that there must be a clear provision of the statute to enable the owner to pay the contractor and take away that right of the lien-holder, and I find no such provision. If the owner could do this, there would be no occasion for any owner to concern himself over the question of liens. All he would need to do would be to pay the contractor and be discharged. To give such a construction to secs. 19 and 32 would not be simply to nullify the effect of the provisions giving the lien, but actually to negative the provisions themselves, at the option of the owner. It has been suggested that the lien-holder should give a notice. That, however, it seems to me, is an argument for the legislature only. If the owner has a right to pay the contractor notwithstanding the existence of the liens, I fail to see how any notice that might be given could take away or affect that right, in the absence of any statutory authority for such notice. It is said that this throws a great burden on the owner, and there may be a great hardship. Though the present case is not a good illustration of it, yet it can easily be seen that it may seem to work a great hardship to call on an owner who has honestly paid to one person, to pay a second time to another. On the other hand, the intention of the law seems clearly to be that the parties dealing with the contractor need not rely on the solvency of

the contractor, but may look to the owner who receives the benefit, and it would be an equal hardship if, relying on this, they should be refused payment for their work or material. It is said that the owner may not know who have liens. That may be perfectly true, but it is also quite true that he could have protected himself by the terms of his contract against payments to the contractor until he does know. Of course, for the future, this is not of much consequence, since the law has been changed. As regards the burden imposed on the owner, that could be largely shifted with a knowledge of the law, but, so far as it could not be, I can only say that, in my view, that too is a matter for the legislature. The conclusion I come to as to the effect of secs. 19 and 32 is that, when the lien attaches by the furnishing of material or the doing of work, the amount then unpaid, which then or later the owner may legally be required to pay, is the limit of the amount the lien-holder may have recourse against, but that, as far as that amount is concerned, and to the extent of the sum then owing to the lien-holder, no subsequent payment to the contractor will relieve the owner. This, no doubt, involves the taking of accounts in many cases at different periods, because, of course, the lien is limited to the amount owing to the lien-holder, and that amount may change from time to time. It is undoubtedly true that the matter would be much simpler of disposition by looking only at the amount owing to the contractor at the time the case comes before the Court for determination, for in most cases it would simply involve a dismissal of the action, but, in my opinion, that would not carry out the intention of the Act, and I see nothing unworkable in the conclusion I have come to. In this case there is a circumstance which is not involved in the other cases which were argued with it, which, apart from the foregoing considerations, might bring the same result. No payment was made to the contractor after 5th January, but most of the payments were made to persons who but for the payments would have been in the same position as the plaintiffs. This apparently was a simple case of the owner preferring certain lien-holders to others. It may also be observed that except the wages and the first payment on account of a sub-contract, none of these payments were made on the architect's certificate, and the last certificate for wages issued by him shews a balance on the contract of several hundred dollars still unpaid. Part

of these payments were for wages, and, inasmuch as they are given a priority over other liens to the extent of 6 weeks, and no payment was for more than 6 weeks, I think they must be given a priority now.

There is also a charge of $170 for doors and hardware which, under the specifications, the owner was at liberty to furnish for himself. This amount should be deducted from the contract price, as it is an authorized deduction rather than a payment. The other payments cannot be held to have discharged the owner as against any liens in existence when they were made, but, in so far as they are such as could have been the subject of an enforceable lien, they are entitled to rank with the plaintiffs' liens in accordance with the provisions of sec. 30, which indicates the priorities of the different liens and costs. The evidence before me is not such as to enable me to finally determine the matter, and I therefore refer the case to the clerk to ascertain the facts necessary and to report the same, reserving leave to apply for further directions.

An attempt was made to establish a direct liability on the part of the owners for part of the accounts of the plaintiffs. The evidence does not satisfy me of the direct liability for anything except the sum of $17.90 due to McKnight & Frost, for which they will be entitled to judgment, and will not be required to rank with other liens. There is due to them, besides this sum, the sum of $290 as sub-contractors. To Ross Brothers Limited, there is due the sum of $194 as sub-contractors; to the Northern Hardware Company, $138.35 for material; to W. H. Clark & Co. Limited, $183 for material; to the McInnis Lumber Company, $75.30 for material; and to George Clark, $295 as sub-contractor.

In so far as may be necessary to determine the rights of the parties, the clerk will ascertain how these amounts fell due as to date. This will only be necessary with reference to the payment on 22nd April, since all the other payments appear to have been made after the full amount came due in each case. The defendants Gorman, Clancy, and Grindley will have their costs of appearance, which appear to be the only costs separately incurred by them, against the plaintiffs in the action in which they were made parties, and which is dismissed as against them.

ALBERTA.

HARVEY, J. APRIL 7TH, 1908.

TRIAL.

GORMAN v. HENDERSON.

Mechanics' Liens — Building Contract — Action to Enforce Liens—Payment in Full to Contractor—Prejudice to Existing Liens—Deduction of Damages for Delay—Evidence —Conflict of Testimony—Credibility of Party as Witness —Costs.

Consolidated action to enforce mechanics' liens.

W. G. Harrison, H. H. Parlee, and G. B. O'Connor, for plaintiffs.

J. D. Hyndman and H. H. Hyndman, for defendant Henderson.

HARVEY, J.:—As in Ross Brothers Limited v. Gorman, ante, this is a consolidated action to enforce liens claimed against a house and lot of the defendant. The claims in all amount to about $1,600, and the defence is, in short, that the defendant has paid the contractor the full contract price except the sum of $205, which she claims to deduct by way of damages under the terms of the contract for delay in finishing, and $570 which she brings into Court to meet her liability in respect of the plaintiffs' claims.

The payments in this case were all made to the contractor, and, as I held in Ross Brothers Limited v. Gorman, such payments cannot be allowed to prejudice the liens then existing. With reference to the deduction of $205 for damages, I am referred to sec. 17, which provides that "the whole contract price shall be payable in cash and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favour of the owner against the contractor." In 27 Cyc. 303 it is stated that such a provision as this applies only to offsets arising outside the contract. I do not find it necessary to decide this, because the evidence does not satisfy me that, even as against the contractor, the defendant would be entitled to deduct this. The evidence was of a very casual character, and amounted to practically nothing more than that the defendant could not get into the house until the time she did. There was no evidence that

this was due to the default of the contractor for which he should be held liable, and, as against honest claimants of liens who are not able to give any evidence on the point, I think much more conclusive evidence should be forthcoming to support such a claim.

In support of the claim of Gorman, Clancy, & Grindley, Mr. Gorman swore to certain facts in his affidavit for an originating summons, and contradicted it in the box, and explained the contradiction by stating that he did not read the affidavit, but swore to it simply because it was presented to him by his solicitor. I indicated my deprecation of such an act by an intelligent business man, and I desire to emphasize it by depriving him of his costs of the action. There was a conflict of testimony between him and defendant's husband as to whether certain goods were ordered for her or for the contractor. Plaintiff can scarcely be surprised if I attach no greater value to his oath than he appears to do himself, and find against him on this point that there is no direct liability on the part of defendant. I find that each of the plaintiffs is entitled to a lien, and refer the matter to the clerk to ascertain the amount in each case and the state of the account between the defendant and the contractor at the different stages of the doing of the work or supplying the material in respect of which the liens arise, as indicated in Ross Brothers Limited v. Gorman. Leave reserved to apply for further directions.

ALBERTA.

HARVEY, J. APRIL 7TH, 1908.

TRIAL.

UNION LUMBER CO. v. PORTER.

Mechanics' Liens—Building Contract—Payment of Part of Contract Price to Contractor—Abandonment of Work by Contractor — Completion by Owner—Payments to Contractor—Prejudice of Existing Liens—Liability of Owner for Work Done or Material Supplied after Abandonment —Promise to Pay—Consideration—Time of Registering Lien—Material Supplied within 31 Days not Claimed for —Effect as to Material Previously Supplied.

A consolidated action brought by sub-contractors and furnishers of materials to enforce mechanics' liens.

J. E. Wallbridge, J. K. Macdonald, C. A. Grant, and Eagar, for plaintiffs.

C. F. Newell, for defendant.

HARVEY, J.:—This is a consolidated lien action brought by sub-contractors and furnishers of materials. The contract price was $6,765, and, after the contractor had been paid $4,500 through the medium of the architect, he abandoned the work and left the city, and the building was completed by the defendant, the amount paid by her being $2,375 in addition, or a total of $6,875. There was nothing to indicate that the work was not done in an economical manner, and I therefore find that the $2,375 was a proper amount for the completion of the building. In Ross Brothers Limited v. Gorman, ante, I held that any payments made to the contractor could not discharge the owner as against then existing liens, and also that when the lien attached the extent of the owner's liability in respect thereof was to be determined by the amount to which she then or later might be liable to pay on the contract. On the facts above stated it appears quite clear that there was no liability on the owner's part on the contract after the payment of the $4,500 to the contractor, because the building was completed by the owner, and there was no surplus which the contractor could claim, but, in so far as any of these liens are for work or material supplied after the contractor abandoned the work, the defendant is, I think, directly liable, because the work was done and materials supplied for her and not under the contract, even though they may have been in completion of a sub-contract previously made with the contractor.

McKay & Brehaut claim a lien for $360 balance unpaid on a sub-contract for $660. The $300 was paid by the contractor before he left, and the work was 60 per cent. done when he left. The plaintiffs' witness states that defendant promised to pay all that was due. She denies this, but admits that she said she would not live in a house that was not paid for, and that she never dreamed that there would not be sufficient in the contract price to pay all claims. The architect also says the same. I find that there was, at least in effect, a promise to pay, and that the completion of the work was a sufficient consideration to support the promise. The defendant is, therefore, liable for the full amount of this lien apart from any consideration of payments to the contractor.

I come to the same conclusion, for the same reasons, with reference to the sub-contract of plaintiff Burns, the amount being $265, of which $100 in value was done when the contractor left.

Of the Alberta Lumber Co.'s claim, material to the value of $183.25 was delivered to defendant at the request of the architect, and I hold her liable for that amount, for the reasons above stated. The material representing the remainder of the claim, amounting to $376.15, was supplied to the contractor before the last payments of $2,000, as was the case with the material representing the Union Lumber Co.'s claim (which was proved at $188.32), with the exception of all but $30.81 in value, which was supplied to the contractor, but after the last payment of $2,000. None of the material claimed for was furnished within 31 days of the time of the filing of the lien, but material continued to be supplied to defendant's manager, who paid for it. I think the continuing to supply material keeps the lien alive under the terms of the statute in respect of all material supplied before. If it were otherwise, all a person who wished to get rid of a lien would need to do would be to pay for the last 31 days' work or material, and so cut out the claim for all that was done or supplied before.

It was admitted that plaintiff Smales did the work for which he claims payment of a balance of $379.60, but I have no evidence as to when it was done; I will allow that evidence to be given if the date cannot be admitted.

As the last payments to the contractor were so large, it is quite clear that all of the liens claimed for in respect of all the work done for the contractor would not nearly equal that amount, and there will be no question of deduction, and no necessity for a reference. The Union Lumber Co.'s lien, of course, will be limited to the sum of $157.51. There will be judgment, therefore, against the defendant personally for the amounts for which she is found directly responsible, and for a lien in the usual terms for those sums, and in the case of the Alberta Lumber Co. the further sum of $376.15, and of the Union Lumber Co. for the sum of $157.51. The amount of the lien, if any, for plaintiff Smales will have to be determined when the further evidence is given.

The judgment will carry the costs, including costs of examination for discovery.

ALBERTA.

HARVEY, J. APRIL 29TH, 1908.

CHAMBERS.

FLORA v. SHANDRO.

Pleading—Statement of Claim—Disclosure of Cause of Action—Malicious Prosecution—Charge not Known to Law—Facts Pleaded to Shew Malice—Absence of Prayer or Claim—Amendment—Costs.

Motion by defendant to strike out the statement of claim, "as being embarrassing in that it does not disclose any cause of action against the defendant."

O. M. Biggar, for defendant.

H. H. Robertson, for plaintiff.

HARVEY, J.:—It appeared incidentally that the defendant has not yet entered an appearance, and I have had some doubt whether, under those circumstances, he has any right to have his motion considered. I have come to the conclusion, however, since the motion was argued by the other side without objection, that the circumstances may be disregarded. It would seem, moreover, that by appearing on a motion such as this, or even on a motion of the plaintiff, the defendant waives any right he might have to object to the jurisdiction: see Boyle v. Sacker, 39 Ch. D. 249.

The statement of claim is as follows:—

"1. The plaintiff is a farmer residing at the P. O. of Shandro in the province of Alberta, and the defendant is also a farmer residing at the same place.

"2. The defendant on the 9th day of February, A. D. 1907, maliciously and without reasonable or probable cause preferred a charge that the plaintiff did assault Stephan Shandro by using abusive language contrary to sec. 265 against the plaintiff before James Hamilton, a justice of the peace sitting at Andrew, and the said justice, having heard the evidence adduced against the plaintiff on the said charge, dismissed the same.

"3. The defendant further on the 3rd day of May, A. D. 1907, subsequent to the charge aforesaid, maliciously and without reasonable or probable cause preferred another charge that the plaintiff 'did wilfully disturb an assemblage met for religious purposes in a church' against the plaintiff, before John Fleming, a justice of the peace sitting at Vegreville, and the said justice assessed the costs and a fine herein against the plaintiff by default.

"4. The said alleged offences were said to have both been committed on the same day at the same time and place.

"5. The plaintiff has in consequence suffered the following special damage:—

Time lost in attending the trial and expenses.....	$25
Fine and costs	19
	$44

"6. Damages $1,000."

It is not urged that paragraph 3 shews any cause of action, but it is said that it shews malice. That would appear to be a pleading of evidence, which is forbidden by the Rules and therefore improper. It is also pointed out that there is no prayer for relief of any kind. Apparently the plaintiff's solicitors assume that paragraph 6 will be taken as a claim for $1,000, as otherwise it means nothing. The defendant, however, is, I think, entitled to know whether any paragraph of a statement of claim means anything without having to guess at it, and this pleading is undoubtedly bad in this respect. These objections do not, however, go to the root of the motion by which the ground of embarrassment alleged is that no cause of action is disclosed, and they can be met by amendment.

There seems no doubt that the charge recited in paragraph 2 is not a criminal charge known to our law of which a person could be properly convicted, and in Grimes v. Miller, 23 A. R. 764, it was held, Hagarty, C.J., dissenting, that, although the plaintiff had been convicted and suffered imprisonment, yet, inasmuch as the charge was not one for which he might properly be convicted, the prosecution of it, though malicious, gave no cause of action. This decision is not binding on me, and I prefer to adopt the view of the dissenting Judge, for it seems most unreasonable to say that by simply acting in an illegal manner a man may escape the conse-

quences of his act, while if he had acted legally he would have been liable. Moreover, this view appears to be not without authority. In Powell v. Hiltgen, 5 Terr. L. R. 16, Mr Justice Wetmore in a considered judgment, after a review of the authorities, held that the malicious prosecution of a charge which was not a criminal offence gave a cause of action. In Anderson v. Wilson, 25 O. R. 91, Chief Justice Armour, in delivering the judgment of the Court, says, at p. 97: "I am of opinion, therefore, that malicious prosecution would lie against the defendant, although the offence was not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant was a void warrant." It seems quite clear that an action will lie for the maliciously procuring the issue of a search warrant for goods: see Elsee v. Smith, 1 D. & R. 28; Wyatt v. White, 29 L. J. Ex. 193.

Whether the action should be termed one for malicious prosecution, as ordinarily defined, or not, does not appear to be material, but, in my opinion, there is a cause of action disclosed in the second paragraph, and the application will be dismissed, but, inasmuch as the statement was shewn to be bad in other respects, though not coming within the scope of the application, the costs will be costs in the cause. The costs of any amendment which the plaintiff may see fit to make will, of course, be borne by him.

ALBERTA.

BECK, J. MAY, 1908.

TRIAL.

MINGER & WEBER v. ANDERSON.

Attachment of Debts—Balance of Purchase Money of Business of Partnership—Promissory Note in Favour of Wife of one Partner—Rights of Creditors of Firm and of Individual Partners—Debt Actually Due by Partner to Wife—Garnishee Proceedings Ineffectice.

Interpleader issue.

C. B. Reilly and E. H. Nichols, for execution creditors.

E. F. Ryan, for the claimant.

BECK, J.:—James U. Crist and Charles A. Crist as partners bought the restaurant business of Anderson & Oliver, who had been carrying it on in partnership. After provid-

ing for certain charges against the property conveyed, there remained a balance of purchase money of $500 to be paid direct by Crist & Crist to Anderson & Oliver. By the terms of the agreement, a note was to be given for this sum. When it was being drawn up, Anderson requested that it be drawn in favour of his wife. This was assented to without objection on the part of either Crist & Crist or Oliver. Oliver explained in his evidence that he recognized that Anderson was entitled to the whole of the $500, and therefore to have the note made payable to his wife, because Anderson had put into the business a sum greater in excess of what he (Oliver) had put in than $500. It seems never to have occurred to Oliver that the debts of the partnership should first have been provided for to the extent of this $500. The note was not produced, having, it appears, been mislaid. I gather, however, that it was not the note of Crist & Crist, either as a firm or as individuals, but the personal note of James U. Crist alone. Anderson & Oliver, as partners at the date of the sale to Crist & Crist, were indebted to several persons, who sued, and immediately, that is, before judgment, issued garnishee summonses, and ultimately obtained judgments as follows:—

1. Minger & Weber v. Charles Anderson..... $———
2. Dixon & Co. Ltd. v. Anderson & Oliver..... 95.00
3. Plunket & Savage v. Anderson & Oliver.... 30.50
4. Hotel Supply Co. v. Anderson & Oliver..... 464.82

The garnishee summonses were as follows:—

1. Minger & Weber v. James U. Crist, served 16th January, 1908.
2. Dixon & Co. v. James U. Crist, served 16th January, 1908.
3. Plunket & Savage v. James U. Crist, served 17th January, 1908.
4. Hotel Supply Co. v. James U. Crist, served 17th January, 1908.

Hotel Supply Company v. James U. Crist and Charles A. Crist, served 20th January, 1908.

On 23rd January, 1908, in the action of the Hotel Supply Company, an order was made in aid of the garnishee summons, adding Mrs. Anderson as a defendant and restraining the defendants from negotiating the $500 note. The garnishees, pursuant to an order, paid into Court the $500, less the statutory costs, stating the fact that it was the amount of the outstanding note above mentioned, and suggesting the claims of the several primary creditors.

An issue was subsequently directed to try the question of the right to the money so paid in, and it is this issue which was tried before me.

I find as a fact that Anderson was indebted to his wife in the sum of $500 when the note was delivered to her. Neither the order directing the issue nor the issue itself is explicit as to which—the primary creditors or Mrs. Anderson—is the plaintiff in the issue. The issue recites that the primary creditors claim to be entitled to the moneys in Court and that the "defendants" (Anderson & Oliver and Mrs. Anderson) claim that the moneys should be paid to Mrs. Anderson. By inference, therefore, I conclude that the primary creditors are the plaintiffs, and that the burden of proof lies upon them. My opinion is that, by virtue of the note, Crist & Crist or James U. Crist, if the note was his individual note, became legally indebted to Mrs. Anderson for the amount of the note, and therefore there was thereafter no debt, either legal or equitable, due or accruing due from Crist & Crist or either of them, to Anderson & Oliver or either of them, and consequently the garnishee proceedings were wholly ineffective. Had I failed to find that Anderson was indebted to Mrs. Anderson, would, even in that event, these garnishee proceedings have been effective? In the first case, that of Minger & Weber, the judgment is against Charles Anderson only, and the garnishee summons is against James U. Crist. Setting the note aside, the indebtedness was one from the firm of Crist & Crist to the firm of Anderson & Oliver. On a claim in an action against one member of a firm in his individual capacity, a garnishee summons cannot affect a debt owing to the firm. That debt could not be recovered by the judgment debtor suing alone only the garnishees: Macdonald v. Tacquiah, etc., Co., 13 Q. B. D. 535.

I think, too, that a garnishee summons against an individual who is a member of a firm cannot affect a debt owing by the firm, as such, because the debt owing by the firm is one for which the individual members of the firm are liable only jointly and not severally: The Partnership Ordinance, ch. 7 of 1899, sec. 11; Lindley on Partnership, 7th ed., pp. 221, 222.

So that, in my opinion, the garnishee summons in the first action is entirely ineffective, independently of the question whether Mrs. Anderson is entitled to the $500 or not.

In the second case—that of Dixon & Co.—and the third case—that of Plunket & Savage—the judgments are against the firm of Anderson & Oliver, and the garnishee summonses against James U. Crist, one of the firm of Crist & Crist. Setting aside the note, the debt was one by the firm of Crist & Crist, and, for the reason I have already given, the garnishee summons would be ineffective. However, as I have already stated, it appears that the note given to Mrs. Anderson was the personal note of James U. Crist alone: that is, James U. Crist assumed personally the theretofore existing firm liability, and became individually liable for the debt. But it seems to me he was so liable only directly upon the note—with what result? It seems to me that the garnishee summons could be deemed effective in such a case, if at all, only if the transaction represented by the note were not attacked in substance, but were substantially accepted, and the primary creditors' right to succeed placed upon the ground that the payee of the note was a mere trustee for the primary debtors; but the facts in the present case would not justify such a position, if my finding is correct that Anderson was indebted to his wife. If my finding is incorrect, a further question is raised which is dealt with later.

On the fourth case—that of the Hotel Supply Co.—the judgment is against the firm of Anderson & Oliver; the first garnishee summons is as in the two preceding cases; the second garnishee summons is against the individuals composing the firm of Crist & Crist, who, apart from the note, were the debtors to the defendants. I should be disposed to hold that the garnishee summons can be issued against a firm in the firm name, notwithstanding the decision in Walker v. Rooke, 6 Q. B. D. 631, and the fact that the English Order 48a has not been introduced into our Rules. The English system of attachment of debts is by way of an order, and that decision was based on the ground that the Rules as to proceeding against a firm were not applicable to an attaching order, but our system being by way of a summons in the nature of a writ of summons, which, it is expressly provided, may be served in the same manner as a writ of summons, it seems to me that the reasoning of the case cited does not apply. The garnishees, however, were not named by their firm name, but as individuals, and it seems to me that, had the liability of Crist & Crist to Anderson & Oliver continued as a direct liability from the former to the latter, this last

garnishee summons would have effectively attached it, Crist & Crist being as partners jointly liable for the debt and both being named as garnishees. The note having been given, it appears to me that the process of garnishee summons is rendered ineffective because, as I think, in consequence of the note being given and accepted, there was no debt either legal or equitable due or accruing due by Crist & Crist to the primary debtors, Anderson & Oliver. Assuming that the taking of the note of one of the firm would not release the other member of the firm on the original liability, so that on default of payment the firm's original liability would revive (see Lindley on Partnership, 7th ed., pp. 284, 285), the debt in this case had been made payable to Mrs. Anderson, and she was entitled to sue for it, not Anderson & Oliver. Assuming the correctness of my finding that Anderson was indebted to his wife, there was a good consideration: assuming the incorrectness of that finding, then the making of the note in Mrs. Anderson's favour was a fraud. Can an attaching creditor succeed on such a ground in garnishee proceedings? The decision of the Supreme Court of Canada in Hull v. Donohoe, 24 S. C. R. 683, necessitates, I think, a negative answer.

In the result and in every aspect of the case I am compelled to hold that none of the primary creditors can succeed in these proceedings.

I order that the money in Court be paid out to Mrs. Anderson. I give no costs. I direct proceedings to be stayed for 10 days.

SASKATCHEWAN.

LAMONT, J. APRIL 6TH, 1908.

WATEROUS ENGINE WORKS CO. v. WEAVER.

Dominion Lands Act—Lien or Charge on Land for Purchase Price of Machinery—Agreement to Give — Mortgage of Homestead before Recommendation for Patent—Invalidity—Statutes—Action for Price—Amendment — Declaration of Lien—Costs.

On 9th July, 1906, the defendant entered into an agreement in writing with the plaintiffs by which he agreed to

purchase one 20-horse power Minneapolis Return Flue second-hand engine, one driving belt, and one tank pump, for $1,000. The agreement contained a clause that for the purpose of securing the payment of the purchase price the defendant agreed to deliver to the plaintiffs a mortgage on all lands owned by him. The money was not paid, and the plaintiffs brought this action, and claimed in their statement of claim the sum of $1,075.75. On the trial the plaintiffs moved to amend their statement of claim by adding a clause claiming a declaration that the plaintiffs were entitled to a lien on the south-east quarter of section 20 in township 24 in range 17 west of the third meridian, for payment of that sum. The Judge allowed the amendment. The described land was the homestead of the defendant and the only land owned by him.

Shannon, for plaintiff.

Jordon, for defendant.

LAMONT, J.:—The plaintiffs did not deliver a 20-horse power engine. After the signing of the agreement, they found that the second-hand engine they had on hand was not a 20-horse power, but an 18-horse power, and on 24th July, 1906, they wrote the defendant to that effect and asked him for instructions as to whether or not they were to ship it. The defendant replied that he thought that the engine would do, and later on telegraphed the plaintiffs to ship it.

At the trial I gave judgment for the plaintiffs for the sum of $1,021.75, but reserved the question as to the plaintiff's right to have a lien on the land for the amount of their judgment.

On behalf of the defendant it was urged that the plaintiffs could not succeed, because:

(1) The land sought to be charged was the homestead of the defendant, and at the time the agreement was entered into the defendant had not received certificate of recommendation for patent, and the agreement was, therefore, void under sec. 42 of the Dominion Lands Act.

(2) That the engine specified in the agreement was never delivered, and there had been no agreement to give a mortgage securing the price of the 18-horse power engine.

(3) That the plaintiffs' agent knew at the time he got the agreement signed that the defendant was not aware that

it contained a clause by which he agreed to give a mortgage.

As to the first contention, the evidence shews that at the date of the signing of the agreement the defendant was not the owner of any land in the province, that he had made homestead entry for the land now sought to be charged with the lien in favour of the plaintiffs, but that he did not receive the certificate of recommendation for patent for said land until October, 1907. Under these circumstances, are the plaintiffs entitled to the lien? I am very clearly of opinion that they are not. At the date of the signing of the agreement, 9th July, 1906, the law relating to the assignment or transfer of homesteads was contained in the Dominion Lands Act, as amended by 60 & 61 Vict. ch. 29, sec. 5, and sec. 73 of the Land Titles Act of 1894, as amended by 61 Vict. ch. 32, sec. 9. Section 42 of the Dominion Act, as amended, reads as follows:—

"42. Unless the Minister otherwise declares, every assignment or transfer of homestead or pre-emption right, or any part thereof, and every agreement to assign or transfer any homestead or pre-emption right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, shall be null and void; and, unless the Minister otherwise declares, the person so assigning or transferring, or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right, and shall not be permitted to make another homestead entry; provided that a person whose homestead or homestead and pre-emption have been recommended for patent by the local agent, and who has received from such agent a certificate to that effect, in the form K. in the schedule to this Act, countersigned by the Commissioner of Dominion Lands, or, in his absence, by a member of the Dominion Lands Board, may legally dispose of and convey, assign, or transfer his right and title therein; and such person shall be considered to have received his certificate upon the date upon which it was so countersigned."

And sec. 73 of the Land Titles Act, as amended, provides as follows: "Provided, however, that nothing in this Act contained shall entitle a settler who is entered for a homestead or homestead and pre-emption under the provisions contained in the Dominion Lands Act, to mortgage the land entered for by him as a homestead or pre-emption prior to issue of a patent to him therefor or until he has

been recommended for patent by the local agent and has received a certificate of recommendation in accordance with the provisions of the said Act; it being hereby declared that notwithstanding anything contained in this Act such mortgage is in the nature of the assignment or transfer which is prohibited by section 412 of the said Act."

This section declares that a mortgage is in the nature of an assignment or transfer, and sec. 42 provides that an agreement to assign or transfer any homestead right before the issue of a certificate of recommendation for patent shall be void unless the Minister of the Interior declares otherwise. In this case there is no evidence that the Minister has declared otherwise, and I, therefore, hold that the agreement by the defendant to mortgage his homestead to the plaintiffs is void: Park v. Long, 7 W. L. R. 309; Sawyer-Massey Co. v. Dennis, 7 W. L. R. 272.

Having reached this conclusion on this point, it is unnecessary that I consider the other two.

As the plaintiffs succeeded in obtaining judgment for the purchase price of the engine, they will have the general costs of the action. The costs of the application to amend the statement of claim will be to the defendant.

SASKATCHEWAN.

LAMONT, J. MAY 9TH, 1908.

CHAMBERS.

CRAFTSMEN LIMITED v. HUNTER.

Summary Judgment—Rule 103—Objections to Motion—Material Omission in Copy of Affidavit Served—Non-compliance with Rules of Court—Re-service and Amendment Allowed on Terms—Action for Same Cause Pending in District Court—Bar to Prosecution of Action in Supreme Court—Dismissal of Motion.

Application by plaintiffs under Rule 103 for leave to enter final judgment against the defendant for the amount of the plaintiffs' claim as set out in the statement of claim.

J. A. Allan, for plaintiffs.

J. A. Cross, for defendant.

LAMONT, J.:—The facts leading up to the application appear to be as follows. On and prior to 18th July, 1907, the plaintiffs supplied material for and did work on a certain building for defendant to the amount of $346.61. On 17th August, 1907, the plaintiffs registered a mechanics' lien against the land on which the said building was erected. On 14th November they issued a writ out of the District Court, and claimed judgment for the amount of their claim, and in default thereof that the interest of the defendant in the property against which the mechanics' lien had been registered might be sold, and the plaintiffs' claim paid out of the proceeds. The defendant entered an appearance to the action, and the plaintiffs made application to the learned Chief Justice, as acting Judge of the District Court, for leave to sign final judgment. The learned Chief Justice dismissed the application with costs, on the ground that, as the mechanics' lien had been registered prior to the coming into force of the District Courts Act, the District Court had no jurisdiction to entertain the action.

The plaintiffs then, without discontinuing the action in the District Court, issued a writ out of the Supreme Court, claiming $346.61, the amount of their account. The defendant appeared to this writ, and the plaintiffs made an application before me for leave to enter final judgment. On the hearing of the application, Mr. Cross, for the defendant, raised two praised two preliminary objections: (1) that the copy of the affidavit of T. T. Clemeshaw, served with the summons, was not a true copy of the original affidavit filed, and that there was entirely omitted from the copy served the following clause contained in the original: "And in my belief there is no defence to the action on the merits;" (2) that this action was for the same subject matter as the action in the District Court, and that action not having been abandoned or discontinued nor the costs thereof paid, the plaintiff was not only not entitled to final judgment, but was not entitled to prosecute the action in the Supreme Court at all, and the Court should order a stay of proceedings.

As to the first of the above objections, Rule 104 reads as follows: "The application by the plaintiff under the last preceding Rule shall be by summons. A copy of the summons and copies of affidavits and exhibits referred to therein (unless service of copies of such exhibits be dispensed

with by the Judge) shall be served at least four clear days before the summons is returnable."

The affidavit of T. T. Clemeshaw, who was secretary-treasurer of the plaintiff company, verified the causes of action and the amount claimed, as required by Rule 103, and contained the statement (also required by Rule 103) that, "in my belief, there is no defence to this action on the merits."

The copy of the affidavit served was the same as the original, with the exception that it did not contain the latter statement.

A copy of an affidavit need not be an exact copy. It does not necessarily mean a copy free from clerical errors. It did not in Gardnor v. Shaw, 24 L. T. N. S. 319, where Gardnor's name was spelt with an "e" instead of an "o;" nor in Ex p. Kahen, 21 Ch. D. 873, where a copy of a bill of sale was held to be a true copy of the original filed, although certain words had been omitted therefrom. These omissions were held to be merely clerical errors.

The irregularity in this case, however, cannot be said to be a clerical error. It was the omission of a material and necessary allegation, an allegation which, if it had been omitted from the original affidavit, would have clearly rendered that affidavit insufficient. In my opinion, the document served cannot be considered as a copy of the affidavit within the meaning of the Rule, and the Rule has, therefore, not been complied with. This non-compliance, however, is not necessarily fatal to the application. The irregularity may, I think, be remedied and justice done by enlarging the application and directing the plaintiff to serve a proper affidavit and pay the costs of the enlargement. See Litchfield v. Jones, 25 Ch. D. 64.

Now as to the second objection. The action was brought in the District Court. The defendant appeared, and plaintiffs moved for leave to sign final judgment. The application was dismissed, on the ground that the District Court had no jurisdiction to entertain the action. Under these circumstances, what were the rights of the plaintiffs? It seems to me they might have taken either of two courses. They might (1) have applied to a Judge of the Supreme Court under sec. 40 of the District Courts Act to have the action transferred to the Supreme Court and continued there; or (2) they might have applied under Rule 174 for

leave to discontinue, and, having obtained that leave, have commenced an action in the Supreme Court.

Section 33 of the District Courts Act is as follows: "33 Subject to the provisions of section 31, if in any action in a District Court it appears to a Judge thereof that the title of land comes bona fide in question, or that such Court from any other cause has not jurisdiction therein, the Judge shall order that the proceedings in the District Court in such action be stayed, and shall certify the reason for such stay.

"2. Upon the receipt by the clerk of such certificate, he shall forthwith transmit the record in such action, together with a copy of the certificate, to the local registrar of the Supreme Court for the judicial district in which the place designated for the trial is situated."

This section provides for staying proceedings in the District Court and transferring the record to the local registrar of the Supreme Court whenever it appears to the Judge that the District Court has not jurisdiction. This may happen either at the trial, where the evidence shews facts which exclude the jurisdiction of the Court, or before the trial on motion for that purpose. The staying of the proceedings in the District Court and the transmitting of the record to the local registrar of the Supreme Court do not, however, of themselves transfer the action into the Supreme Court. To obtain such transfer, an application to the Supreme Court is necessary. Upon such application "the Court or a Judge thereof, upon such terms as are thought fit, may order the action to be transferred from the District Court to the Supreme Court:" District Courts Act, 1907, sec. 40; and thereafter the action will be continued in the Supreme Court as if originally commenced there.

The other course open to plaintiffs was to discontinue the action in the District Court. Rule 174 makes provision by which a plaintiff may discontinue. Under that Rule, the plaintiff, after defence is delivered, and he has taken a further step in the action, cannot discontinue without leave of the Court or Judge, but such leave may be granted upon such terms as to costs and as to any other action as may be just. The object of requiring the plaintiff to obtain leave of the Court to discontinue is clear. It is to prevent the plaintiff, after he had brought the defendant into Court and brought the proceedings to a certain stage, from dropping the action and avoiding the contest. In Fox v. Star

Newspaper Co., [1898] 1 Q. B. 636, Chitty, L.J., in referring to Order xxvi., r. 1, which is the same as our Rule 174, said: "The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the Judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

It seems clear, therefore, that the plaintiffs, not being at liberty to discontinue without the leave of the Court, must obtain that leave before they can prosecute an action in another Court for the same subject-matter.

The plaintiffs adopted neither of these courses. The action in the District Court is still pending, and I see no reason why even yet they could not apply to a Judge of the Supreme Court to have the action transferred from the District Court if they so desire it. But, so long as the District Court action is not discontinued, I am of opinion that the plaintiffs are not entitled to prosecute the present action in the Supreme Court, and on a proper application therefor the defendant would be entitled to a stay of proceedings until that action had been discontinued.

The present application must be dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. MAY 11TH, 1908.

CHAMBERS.

BEAVER LUMBER CO. v. ECKSTEIN.

Practice—Chambers Summons—Irregularity — Omission of Name and Address of Solicitor Issuing Summons — Irregularity — Amendment—Costs.

Application on behalf of the plaintiffs for judgment against the defendants, Jacob and Henry Eckstein, and that on default of the amount of the judgment being paid into Court, the interests of such defendants in a certain specified lot of land be sold.

J. C. Secord, for plaintiffs.

A. Casey, for defendants.

WETMORE, C.J.:—A Chambers summons was issued intituled in the Court and cause, which commences as follows: "Upon the application of the above-named plaintiffs by their solicitor. . . . let the above-named defendants, their solicitor or agent, appear before the presiding Judge in Chambers," etc. The summons was indorsed as follows: "John C. Secord, Advocate, Regina, Sask." The name of the solicitor did not appear in the body of the summons, which was, therefore, in that respect, not in accordance with the form of summons No. 1 (appendix K) prescribed by the English Rules of Court. Rule 535 of the Judicature Ordinance provides that the forms contained in the schedule to the Ordinance shall be used with such variation as circumstances may require, and as to all other matters, the forms used in the administration of civil justice in England, with such variation as will make them respectively applicable to proceedings in the Supreme Court of the Territories, may be used. There are no forms for Chambers summons provided by the Ordinance. Order lxi., Rule 32, of the English Rules provides that the forms contained in the appendices shall be used in and for the purposes of the central office, with such variations as circumstances may require. I have no doubt that the form of summons to which I have referred as set out in the appendix, of course changed to suit the practice here, is a proper form of summons to be used under the practice of this Court. It will be observed that the provision in Rule 535 as to use of forms used in the administration of justice in England in the practice here is permissive. However, I may say that I consider this to be one of those cases where the permissive language must be used as imperative. I am of opinion, therefore, that the omission to state in the summons the name of the solicitor taking out the summons is an irregularity.

Counsel appeared on behalf of the defendants Eckstein at the return of the summons and objected to the application being made by reason of the irregularity. Counsel stated that he appeared for the mere purpose of taking the objection and for no other purpose. I have very great doubts as to whether it is open to the defendants to raise this objection in this way and at that stage, or whether he ought not to have made a substantive application to set the proceeding aside; otherwise he would be allowed to have the proceedings set aside and avoid the requirements of

Rule 540 of the Ordinance. However, I make no ruling on that question; I merely intimate my doubts. This omission clearly does not render the proceeding a nullity. It is merely a non-compliance with some of the provisions of the Ordinance, and Rule 538 provides that non-compliance with any of the provisions of the Ordinance shall not render any proceedings void unless a Court or Judge shall direct. I certainly would not direct that this omission should be treated as a nullity. The defendants were in no way misled, and the objection is of the most technical character. In fact counsel for the defendants was prepared, if the objection was overruled, to proceed on the merits of the application. In Hoesler v. Hanover Koutchouc, etc., Works, 10 Times L. R. 22, 103, the Court held that the omission of the address of the plaintiff's solicitor from the notice of the writ served abroad did not invalidate the service This decision was made under Order lxx., Rule 7, of the English Rules, which is exactly the same as 535 of the Ordinance. I think that case similar in effect to this one.

I will, therefore, order that the Chambers summons be amended by inserting therein the following: "This summons was taken out by John C. Secord, of Regina, solicitor for the plaintiffs;" and by addressing it to Jacob Eckstein and Henry Eckstein, the above-named defendants, or their attorney, specifying him. There will be no costs of this application, affecting the irregularity of the summons. Of course the plaintiffs' solicitor will pay the fees of the clerk in connection with the amendment.

SASKATCHEWAN.

JOHNSTONE, J. MAY 28TH, 1908.

TRIAL.

BANNERMAN v. GREEN.

Vendor and Purchaser — Contract for Sale of Land—Failure of Vendor to Make Title to Part—Repudiation by Purchaser — Letters — Right to Rescind—Lien for Purchase Money Paid — Interest — Specific Performance—Sale of Land—Lien—Costs.

Action for specific performance of a contract for the sale of land.

G. E. Taylor, Moose Jaw, for plaintiff.

W. B. Willoughby, Moose Jaw, for defendant Green.

E. Armstrong, Moose Jaw, for defendant Hitchcock.

JOHNSTONE, J.:—On 26th August, 1902, the defendant Green, by writing under seal, agreed to sell to the plaintiff section 32, township 16, range 1, west of the 3rd meridian, in the province of Saskatchewan, at and for the price of $2,560, $1,280 cash, and $640 on 26th August, 1903, and the balance, $640, on 26th August, 1904. In the latter part of September of the year 1902 the plaintiff and defendant Green met in the office of the defendant Green at Moose Jaw, where, it is stated by the plaintiff, he was informed by Green that he, Green, could not carry out his agreement as to the sale of the east half of the before-mentioned section; that he could not make title; and the plaintiff further states that it was then agreed and understood between them that in the event of Green being unable to obtain title to the east half, and the plaintiff unable to find any other land in lieu thereof suitable, the money paid on account of the purchase price for the whole section might be applied in payment in full for the west half. A list of lands which he had for sale was given by the defendant Green to the plaintiff, from which the latter might make selection in the place of that of the east half of the section agreed to be sold. After looking over the land contained in this list, the plaintiff proceeded to Seattle, where, on 2nd October, he wrote to the defendant Green as follows: "I called at your office, but not finding you in, I proceeded west. There is no half section in list you gave me I will take instead of half 32. Please complete transfer and send document to me and oblige." To this letter the defendant Green replied on 9th October, as follows: "I beg to acknowledge your letter of the 2nd instant, and to say that as requested by you I am preparing papers for W½ 32-16-1-W 3rd M., and will forward same to you in a day or so. I regret that you have found nothing that you care to locate instead of the other half of 32. I presume that you wish the payment that you made on the whole section to be applied as the first payment on the half." The papers referred to in this latter letter (agreements of sale of the west half) were not received by the plaintiff. They had never been sent to him, as appears from the evidence. They were first seen by the plaintiff when produced by the defendants' counsel on the

examination of the plaintiff, as appears from evidence given at the trial. The lands in question having been purchased through one Hillyard, a real estate agent at Ottawa, and the title not having reached the plaintiff, as promised by Green, a conversation took place between Hillyard and the plaintiff with reference to the transaction, the result of which appears in a communication from Green to the plaintiff dated 27th December, in the following terms: "Mr. R. W. Hillyard writes me that you are not satisfied with the half section of land that you purchased from me last summer. If you like, I will call the deal off and refund your first payment of $1,200 made. I do not see that I can do anything more for you than this, and if you care to do this please advise me at once and oblige." It will be noticed that nothing is here said about being ready and willing to complete the sale of the west half, and it does not appear that there was any communication whatever between the plaintiff and the defendant Green until 10th January, 1903, when the plaintiff wrote that defendant as follows: "Yours of the 27th December to hand, offering to refund $1,200 and cancel the deal. In reply I beg to state that $1,200 is considerably under what I have paid out on this deal. I do not propose to suffer loss in this transaction. Cost of this case to date:

Section at $4 per acre half cash	$1,280.00
Cost of transmission	4.11
Six mos. int. at 6 per cent.	38.52
	$1,322.63

"This is the amount I am out, and nothing short of $1,322.63 will be considered."

The plaintiff again wrote Green on 9th April, 1903, as follows: "On the 10th of January I wrote you stating I desired to get the total amount paid by me for section 32, T 16, R 1, West 3, refunded, with interest at 6 per cent. from date of payment to date of refund, but as yet I have not heard anything from you on the matter. I claim this refund on the ground of misrepresentation; you stated the section was splendid, that it was near Mr. Hillyard's, and that it was a section. I find on examination it is by no means splendid, it is not near Mr. Hillyard's, neither is it a section, but only half a section. As I have now given you ample time to remit, you will please take notice that if this refund is not paid to me in fifteen days from date of this

letter, I will take legal action to recover it, and also lay the case before the Department of Agriculture. The amount is as follows:—

Section at $4 per acre half cash	$1,280.00
Cost of transmission	4.11
8 months' interest	51.36
	$1,335.47"

Having received no reply, the plaintiff again wrote on 30th April, as follows: "On 10th January and 8th April I wrote you requesting a refund of all cash paid by me on S 32, T 16, R 1, W 3, with interest from date of payment to date of refund, but have had no reply from you.

Amount paid	$1,280.00
Cost	4.11
Interest	51.56
	$1,335.67

"If a satisfactory settlement of the amount is not made on or before the 9th of May, action will be taken to recover it, with interest in full."

The defendant Green took no notice of any of these letters, and the plaintiff brought his action. In his defence the defendant Green with other defences denied the making of the agreement referred to; denied that he ever notified the plaintiff, as alleged, that he was unable to make title to the east half of the section, or that he agreed to convey the west half of the section to the plaintiff in consideration of the moneys already paid. It was alleged in the statement of claim as against the defendant Arthur Hitchcock that he held the title to the west half of the section referred to, in trust for his co-defendant Seymour Green. Hitchcock admitted that title to the west half of the northwest quarter had been issued to him as security for advances made by the firm of Hitchcock & McCulloch to the defendant Green, but asserted that such land had been sold and the purchase money received from such sale applied in reduction of the advances so made by Hitchcock & McCulloch to the defendant Green.

On the trial certain admissions of fact signed by counsel for the plaintiff and the defendant Hitchcock were filed, as follows:—

(1) That the defendant Arthur Hitchcock holds as trustee for his co-defendant Seymour Green, freed from any

claim on behalf of himself other than a claim for costs, the following land described in the pleadings herein, that is to say, the west half of section 32 in township 15 in range 1 west of the 3rd meridian, in the province of Saskatchewan, except the west half of the north-west quarter of the same section.

2. That the said west half of the north-west quarter of the said section was sold prior to the commencement of this action, and the sum of $400 received therefor, of which the defendant Green received the benefit.

3. That the defendant Arthur Hitchcock is entitled to a lien upon the said land for his costs as between solicitor and client in this action, and not to exceed $100.

I have to hold on the evidence before me that there was no binding variation of the contract of 26th August. I think what took place between the plaintiff and the defendant after the date mentioned did not amount to such, and the question now arises whether the communications from the plaintiff to the defendant of 10th January, 9th April, and 30th April, were a repudiation of and effected a rescission of the contract of 26th August. Those letters were clearly a declaration by the plaintiff of his intention to repudiate the contract as originally entered into between him and the defendant Green for the reasons contained therein. It is not denied but admitted by the defendant Green that at no time was he in a position to enter into the contract in question; that on 26th August he had no title to the east half of the section; and that at the time he was interviewed by the plaintiff in September he had not got one, nor had he then any prospect of acquiring title to the land, in consequence of which it was then open to the plaintiff to put an end to the contract and to have proceeded to recover back his purchase money. I am convinced that the defendant Green was at no time ready (by which I mean in a position) and willing to convey even the west half of the section as suggested by him in the conversation which took place at Moose Jaw, and further that he was not ready and willing to return the purchase money which he had received from the plaintiff through Hillyard. I think exhibit C was prepared by the defendant Green, was executed and held by him, for the reason stated. As to the legal right of the plaintiff to repudiate, I am clear that he was in a position to do so.

In Forrer v. Nash, 35 Beav. 167, the law bearing on the subject is laid down by the Master of the Rolls in the words following: "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold."

The law as so laid down was followed in Brewer v. Broadwood, 22 Ch. D. 105; also in Bellamy v. Debenham, [1891] 1 Ch. 413. In the latter case specific performance was sought of an alleged agreement contained in correspondence between the parties. There, the defendant had written to the plaintiff's agent in these words: "I am prepared myself to offer you £800 for the freehold, with possession at midsummer. I am assuming, of course, that the title is satisfactory, and that all the ground now occupied with the house is included." This offer the plaintiff accepted, but it afterwards transpired that the property was an enfranchised copyhold, and the minerals were reserved to the lord of the manor, whereupon the defendant's solicitors on 20th May wrote: "I see there is this fatal objection—that your client has not the mines and minerals. . . . I am very sorry not to do business, but I cannot possibly advise my client to go on with the matter. I return the draft contract and abstract." These words were held to be a sufficient repudiation, and that the effect was to rescind the contract. Lindley, L.J., at p. 420, says: "It is plain that the vendor had not got what he contracted to sell. The purchaser does not see that until the abstract is sent in, and when it is sent in he says, 'I shall not complete.' The defendant's solicitor in his letter of the 20th of May says that, as the plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th of May a plain repudiation on the part of the defendant of all liability to complete, and he has never flinched from that position . . Having regard to the cases of Hoggart v. Scott, 1 Russ. & My. 293, Forrer v. Nash, In Re Heads Trustees and Macdonald, 45 Ch. D. 310, and Weston v. Savage, 10 Ch. D. 736, the purchaser was justified in taking up that position

and saying 'I will not complete.' That appears to me to be a complete answer on the case of specific performance." Lopes, L.J., at p. 421, said: "I think, looking at the letters of the 17th and 20th of May, the defendant did repudiate the contract. But the question arises whether he had any power to repudiate or rescind. I am dealing now with the action for specific performance. The state of things at that time was this, that the vendor had not a freehold title to the property which the defendant had agreed to purchase. The mines and minerals under the house and the lands did not belong to the vendor, but were reserved to and vested in the lord of the manor. There was, therefore, it appears to me, an absolute want of title to a material part of the subject matter of the defendant's purchase. That being so, had he a right to repudiate the contract? It appears to me that the authorities on this subject are clear." And that portion of the judgment delivered in Forrer v. Nash, already referred to, was quoted and read.

This being my view of the law—this is, that the contract between the parties had been repudiated by the defendant—the further question arises as to whether or not there should be a declaration that the plaintiff was entitled to a lien on account of the $1,200 money paid by him, which relief, though not specifically claimed by the plaintiff in his statement of claim, was set up at the trial before the close of the case to be raised, whereupon I heard arguments of counsel pro and con, resolving to settle in this suit all matters in controversy between the parties. Had there been any doubt as to the law prior to the decision in Rose v. Watson, 10 H. L. C. 671, the judgment in that case settles the law. At p. 678 we find this statement made by the Lord Chancellor: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate." As in the case referred to, so in this, was the money paid by the plaintiff to the defendant under the contract mentioned in the

statement of claim and was so accepted by Green. Lord Cranworth, at p. 682, may be said to have created a precedent when he says: "I concur. There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent. It seems to me that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your Lordships' House, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out which have established that rule, in principle, if not in terms. But I think it is unimportant to go into that, because it is now established, and will from henceforth be established as a very sound principle, founded on solid justice."

I think also on the authority of this case that the plaintiff is entitled to interest on his money paid from the date of payment until judgment, and to a lien therefor as well.

The plaintiff's claim for specific performance is dismissed, but there will be judgment against the defendant Green for $1,200 and interest, and a declaration that the plaintiff is entitled to a lien on the lands held by his co-defendant as trustee; an order that in default of payment on or before the 1st day of September, 1908, the lands so held in trust be sold under the direction of the local Master at Moose Jaw, and that the defendant Hitchcock do transfer such lands to the purchaser at such sale; and in the event of a sale that after payment of the said sum of $1,200 and interest, together with the costs of and incidental to such sale and the costs of the defendant Hitchcock, to be taxed as between solicitor and client, the balance, if any, be paid out to the defendant Green. Save as to these costs, there will be no costs to any party.

THE

Western Law Reporter

Vol. VIII. TORONTO, JULY 15, 1908. No. 6.

MANITOBA.

CAMERON, J. JUNE 2ND, 1908.

TRIAL.

CAIRNS v. CRAWFORD.

Vendor and Purchaser—Contract for Sale of Land—Action by Vendor for Specific Performance—Defence—Misrepresentation of Vendor's Agent as to Situation of Land—Evidence — Commission Paid to Agent by Vendor — Agent Becoming one of the Purchasers.

Action by vendor for specific performance of a contract for the sale and purchase of land. Counterclaim for rescission of the contract.

A. E. Hoskin and J. T. Haig, for plaintiff.

R. G. Affleck and A. G. Kemp, for defendants.

CAMERON, J.:—This is another one of those cases where speculative purchasers, the market having gone against them, seek to evade their liability. The first ground of defence is that the defendant Ross, who was the plaintiff's agent, represented that the property in question was half a mile from the proposed site of the Grand Trunk Pacific Railway Company's shops, whereas in fact it was distant a mile and a half. There is some conflict on this point. The defendants Baxter and Crawford testify to the representation with some positiveness. But I incline to think this is an afterthought on their part. Their co-defendant Jenkins set up the same defence in his pleadings, but offered no evi-

dence whatever at the trial to substantiate it. The defendant D. M. Ross (who was one of the purchasers) asserts positively that he indicated the property, as shewn on the blue print and the map filed at the trial, to Crawford and Baxter, and unequivocally denies that he made any statement that the distance from the site of the shops was half a mile. Crawford and Baxter deny having ever been shewn the blue print and map by D. M. Ross. But Mr. D. A. Ross asserts that he also indicated the situation of this property on the map to these persons. I can see no adequate motive for any such representation on the part of the defendant Ross (who has carried out the contract so far as his share is concerned), and the probabilities are against anything of the kind. I find, in fact, that there was no such representation as alleged, and no attempt at concealment on the part of the defendant Ross. It was open to the other defendants to safeguard their own interests, if they really considered this question of distance of any importance, but they took no steps whatever in that direction. The property was near Winnipeg, and the maps tell the whole story. As one of the defendants stated, they were going it blind. As for Jenkins, all he says is that he went into the speculation because if it was good enough for Crawford and Ross it was good enough for him.

A further defence brought out in the evidence, but not set forth in the pleadings, is that the receipt of a commission on this sale by the defendant Ross vitiates the transaction. I think Hovenden v. Millhoff, 83 L. T. N. S. 41, and other cases cited by Mr. Affleck, are not applicable. Ross was agent for sale for the owner. He was a real estate agent, and as such entitled to a commission. His co-defendants knew his position as such perfectly well. It would be singular if his taking a commission in the regular course of his business could have the effect of setting aside this transaction, particularly as it clearly appears that the plaintiff knew nothing about these purchasers until after the second payment became due.

I dismiss the counterclaim, and I direct a judgment to be entered for the plaintiff for the amount claimed in the statement of claim, with the costs of the action.

MANITOBA.

MATHERS, J. JUNE 5TH, 1908.

TRIAL.

COTTER v. OSBORNE.

Trade Union—Strike—Unlawful Acts—Inducing Workmen to leave or to Abstain from Entering Employment—Conspiracy—Besetting Works of Employers—Picketting—Violence — Threats — Injunction — Local Union — Interlocutory Judgment — Practice—Individual Defendants Representing Union—Destruction of Minute Books—Presumption—Damages—Property of Union.

Action for an injunction to restrain defendants from interfering with plaintiffs' workmen and for damages.

J. E. O'Connor and H. P. Blackwood, for plaintiffs.

H. W. H. Knott, for defendants.

MATHERS, J.:—The plaintiffs are master plumbers and steamfitters, carrying on business in Winnipeg and St. Boniface, and the defendants, other than the defendant Leonard, are officers and members of the Journeymen Plumbers Gas and Steam Fitters and Steam Fitters Helpers. Local Union No. 62, a branch of the United Association of the same name of the United States and Canada. The defendant Leonard is an officer of the United Association.

On or about 30th June, 1906, at the instance of the local union, a form of agreement was presented to each of the plaintiffs for signature, providing, amongst other things, the rate of wages to be paid for the then following year. The plaintiffs each refused to sign this agreement, and all their employees who were members of the local union at once struck and did not return to work until the strike was terminated some months later.

In some of the plaintiffs' shops there were men who did not belong to the union. These men did not all strike with the union men.

The allegations in the statement of claim may be stated paraphrastically as follows. It charges that the defendants, wrongfully and maliciously, without just cause or excuse,

and with intent to injure the plaintiffs and to molest them in their business, and to compel them to sign the agreement, conspired and combined amongst themselves to procure, cause, and induce: first, workmen who remained in the plaintiffs' employ to leave; second, workmen who thereafter entered plaintiffs' employ to leave; third, workmen to abstain from entering plaintiffs' employ.

It is also alleged that with a like intent the defendants conspired and combined: first, to beset and watch the houses or other places where the plaintiffs reside or work or carry on business or happen to be; second, to beset or watch the houses or other places where the workmen remaining in the plaintiffs' employ, or about to enter the employ of the plaintiffs, reside or work or happen to be, and to use violence to such workmen and to injure their property and to intimidate them by threats of violence, and to persistently follow them from place to place and to hide their tools or property and to follow them in a disorderly manner through the streets.

It is further charged that, in pursuance of such conspiracies, the defendants or some of them did all the acts complained of.

This action was brought for an injunction to restrain the defendants and the other members of the local union, their agents and servants, from continuing the acts complained of or similar acts, and for damages. Defences were entered by all the defendants with the exception of T. D. M. Osborne, A. E. Bailey, and M. McRae, and interlocutory judgment was signed against these parties.

Subsequently, on 30th January, 1907, an order was made which provided that the defendants, other than the defendants M. McRae, Walter Hunter, and Harry P. Leonard, should, for the purposes of the action, besides representing themselves, represent all other persons constituting the Journeymen Plumbers Gas and Steam Fitters and Steam Fitters Helpers Local Union No. 62, and that all such other persons should be bound by the proceedings, orders, and judgment in the action, and that the statements of defence filed by the defendants other than Osborne, Bailey, McRae, Hunter, Solly, Saunders, and Harry P. Leonard, or that might afterwards be filed by Osborne or Bailey, should stand as a statement of defence on behalf of and for the benefit of all persons constituting the union.

The defences of all the defendants, with the exception of H. Hunter, George Gosoling, J. J. McRae, Thomas Penstone, John McLaughlin, A. Matheson, Percival Murray, Frank Simmons, Joseph Fryer, Albert Gaudry, W. Brown, John McLean, and G. H. Sopher, were struck out, and interlocutory judgments signed against them. An order was also made by the Referee striking out all the defences filed, in so far as such defences stood as defences for the defendants as representatives of the local union, and interlocutory judgment was signed against the defendants appointed to represent the local union as such representatives.

At the opening of the trial, counsel for the defendants moved to set aside the interlocutory judgment signed against the representatives of the local union as such representatives. No notice of the motion had been given, and I directed that notice of the motion be given if counsel desired to move against the judgment. The motion was not renewed, but at the conclusion of the trial counsel for the defendants contended that the signing of such judgment was a nullity. I cannot agree with that contentoin. It seems to me the judgment is warranted by the practice and must stand.

This simplifies the inquiry to a considerable extent and relieves me from the necessity of inquiring as to the liability of the union for the individual acts of the defendants. Interlocutory judgment having been signed against the defendants as representing the union, the union and all its members at the time of the strike must be held to admit the allegations in the statement of claim, and nothing remains but to make the injunction permanent as to the union and its members and to assess the damages against them. The same may be said as to those defendants against whom interlocutory judgment is signed individually, and the only question remaining is to decide the liability of the individual members of the union whose defences remain on the record.

Before and during the progress of the strike, meetings of the local union were held, at which minutes were kept, and the secretary had correspondence with the International Union. None of this correspondence was produced. The minute book of the union was discovered in the affidavit on production, but it subsequently mysteriously disappeared and was never produced. During the strike meetings were held each morning of those on strike. Minutes of

such meetings were kept, as was also a strike register, in which those on strike were supposed to register their names each morning. These books were not discovered and were not produced. The deliberate destruction of the union minute book, after discovering it in the affidavit on production, and the absence of all other written evidence in any way relating to the strike, forces me to the conclusion that these records were suppressed or destroyed because they contained matter damaging to the defendants in this suit. Under the circumstances, it is my duty not to allow the defendants to profit by their destruction of evidence, but, wherever it would appear that these books or documents would contain evidence, to presume that that evidence is unfavourable to the defendants. If the conclusions arrived at in this way are more unfavourable to the defendants than the facts, if all disclosed, would warrant, they have only themselves to blame.

I do not intend to go into a detailed review of the evidence, but to briefly state my findings of fact.

The plaintiffs would have had no difficulty in supplying the places of the strikers, if they had not been interfered with. I take it the defendants were aware of this fact, and that the only way they could make the strike effective would be to induce all workmen still in the plaintiffs' employ to quit, and to prevent all other men from entering their employ, and they combined to accomplish this purpose. Pickets were appointed to watch the plaintiffs' shops and places where they had work to do and to induce all men working for the plaintiffs to quit. Pickets were also appointed to meet westbound C. P. R. trains east of Winnipeg and persuade any workmen on such trains not to work for the plaintiffs, and for a like purpose pickets were appointed to attend at the C. P. R. station upon the arrival of such trains. The evidence shews that until the granting of the interim injunction restraining the defendants from inducing workmen in the employ of the plaintiffs to leave such employ, it was impossible for the plaintiffs to retain their men, and after the granting of the injunction, they had no difficulty in doing so. On several occasions some of the defendants were observed talking to the men who were working on the different jobs, and on one occasion violence was threatened to a workman by one of the defendants unless he would quit work. These facts, coupled with the direct evidence of efforts made by some of the defendants to

persuade men to leave plaintiffs' employ, and the admission by the business manager of the local union that they had pulled off men, leaves no room for doubt that the men who left the plaintiffs' employ during the strike were induced to do so by the defendants pursuant to a fixed conspiracy to accomplish that purpose.

I also find that the defendants conspired to prevent workmen who were about to enter the employ of the plaintiffs, from doing so, and for that purpose they conspired to and did watch and beset the Canadian Pacific Railway station and trains at Winnipeg and other places where the workmen happened to be.

In order to replace the strikers, the plaintiffs imported a number of men from the eastern provinces under contract to work for a year.

In order to circumvent this movement on the part of the plaintiffs, the defendants sent the defendant Frank Cody and others to board C. P. R. trains east of Winnipeg and interview and endeavour to persuade any men there found not to take employment from the plaintiffs. The attendance of Cody to meet trains coming from the east, and his attempts to induce men so arriving under contract with the plaintiffs not to work for them, is fully established.

The attendance of members of the union in large numbers at the C. P. R. station upon the arrival of trains from the east, and there surrounding and attempting to induce any of plaintiffs' workmen so arriving not to work for the plaintiffs, is also abundantly established. The attendance of these members of the union at the C. P. R. station was not accidental; I am satisfied that it was premeditated and the result of a settled conspiracy to prevent, if possible, all workmen from entering the plaintiffs' employ.

The evidence of threats used by the defendants is not strong, but there is evidence that in one instance a workman who continued to work was threatened with violence by one of the defendants if he did not quit working. As there is not evidence of any other acts of violence or of intimidation practised by the defendants, or any of them, I could not hold that the isolated act of one defendant shewed that there was any general agreement amongst the defendants to practise acts of violence.

The law seems fairly well settled that workmen have a right to strike, and that they have a right to combine to-

gether for that purpose, even although their doing so may result in damage to their employers, provided they have a reasonable excuse for so doing, and the means resorted to be not in themselves unlawful: Chalmers-Hunt on Trade Unions, p. 93; the Mogul Case, [1892] A. C. 25. I take it that the reasonable expectation of improving their own position is a sufficient excuse for their so doing. This conclusion is not in conflict with that arrived at in Metallic Roofing Co. of Canada v. Jose, 14 O. L. R. 156, 9 O. W. R. 786. That decision was based on the finding of the jury that the workmen of the plaintiffs were wrongfully and maliciously coerced to leave their employ. In this case, the agreement which the men presented to the master plumbers asked for an advance of 2½ cents per hour. Had the master plumbers assented to that agreement, the position of the defendants would have been improved financially. I think they had a right to cease work for the purpose of inducing or coercing the masters into making that concession. I cannot find that the purpose of the defendants in quitting was to injure the plaintiffs. That they knew injury would result to the plaintiffs from their action there can be no doubt, but their ostensible purpose was not to do an injury to the plaintiffs, but to bring about a benefit to themselves. Had the scheme of the defendants ended with that, I do not think they would have been guilty of any wrongful act.

I must, however, find that it was part of the scheme, with a view to coercing the plaintiffs into coming to their views, to induce other workmen who were not members of the union and who desired to continue work, to leave their employment, and to prevent the plaintiffs from getting other men to take their places, and for that purpose to watch and beset the places where the men happened to be. In their attempts to induce men to quit the employ of the plaintiffs the defendants did not distinguish between men who were employed under a contract and men who had a right to leave, and in several instances I find that they induced and persuaded men to break contracts. That was the case with Kennedy, who was employed by the plaintiff Gates. The plaintiffs the Cotters brought in 8 men from the east, under yearly contract, to work for them. Upon their arrival at the C. P. R. station, they were beset by a number of the defendants and others, and followed through the streets to the place where they were lodged. That place

was watched by pickets of the union, who spoke to the men as they came out. Subsequently only 4 of these men entered the employ of the Cotters, and there is evidence that the others were by the defendants furnished with transportation out of the city. I think the inference is plain that the members of the union induced these other 4 men to break their contracts. In doing so they were guilty of an actionable wrong: South Wales Miners Federation v. Glamorgan Coal Co., [1905] A. C. 239.

Picketting the plaintiffs' shops and other places where their men were employed for the purpose of persuading men not to work is also unlawful under sec. 501 of the Criminal Code: Lyons v. Wilkins, [1896] 1 Ch. 811, and [1899] 1 Ch. 255. And watching and besetting the C. P. R. station for the purpose of intercepting and persuading men imported by the plaintiffs not to work for them is also against the law: Charnock v. Court, [1899] 2 Ch. 35.

Of the defendants who came to trial, I cannot find that the defendants Hartley or Gosoling were active in promoting or carrying out any of the acts complained of. The defendant Hartley attended only one meeting, at which he was outside guard, and he appears to have known nothing about what was going on. Gosoling was vice-president. and presided at one meeting after the strike, but appears to have taken no other part. It does not appear that any of the things complained of were resolved upon at that meeting. This is not sufficient on which to hold him personally responsible. There is no evidence at all against the defendant Brown.

All the other defendants who came to trial were active in promoting the strike and are individually answerable for the wrongs done: Krug Furniture Co. v. Berlin Union No. 2, 5 O. L. R. 463, 2 O. W. R. 282.

Whilst I am bound, on the evidence, to find that the defendants have broken the law and have thereby rendered themselves liable to damages, I must, in justice to them, say that throughout the whole period of the strike there was no act of violence committed to either person or property—acts which in other strikes have brought discredit upon the cause of labour. And with the one solitary exception, before mentioned, only peaceable persuasion was used to induce men to quit work or not to begin work.

As to the damages, it is somewhat difficult to assess them. The defendants are not liable for the damage caused by

themselves quitting work. They are liable for inducing those who remained in or afterwards entered the plaintiffs' employ to quit, and for preventing others from doing so in the manner before stated. That the plaintiffs were seriously damaged by the strike and what followed it, is beyond dispute, but the difficulty consists in distinguishing between the damage caused by the lawful and by the unlawful acts of the defendants. After giving the matter the best consideration I can, I assess the damages against all the defendants at $2,000, divided amongst the plaintiffs as follows: Duff & Flett, $200; Thompson & Homer, $100; Gates, $400; Northern Plumbing Company, $100; Green & Litster, $300; Cotter Bros., $800; and Dallaire Charrette & Co., $100.

There will be judgment against the defendants individually, except the defendants H. Hartley, George Gosoling, and W. Brown, for $2,000 and costs, and against those defendants who are representatives as representing all persons who on 4th July, 1906, constituted the association of persons known as the Journeymen Plumbers Gas and Steam Fitters and Steam Fitters Helpers Local Union No. 62, and declaring that the property and assets of the said association in the hands of such defendants, or any or either of them, or in the hands of any person or persons or body corporate in trust or for the use of the said Local Union No. 62, or to which the said association or persons are beneficially entitled, are liable to satisfy the claim of the plaintiffs against the said representative defendants for damages and costs.

The injunction must also be perpetual restraining the defendants from persuading, procuring, or inducing workmen to leave the employ of the plaintiffs and of conspiring or combining to induce workmen not to enter plaintiffs' employ, also from besetting or watching places where the plaintiffs or any of their workmen or those seeking to enter their employ reside or carry on business or happen to be, with a view to compel the plaintiffs or said workmen to abstain from doing anything they, or any of them, have a lawful right to do, or from persistently following them or any of them.

MANITOBA.

MATHERS, J. JUNE 5TH, 1908.

TRIAL.

HOLMES v. BROWN.

Mandamus — Claim against City Corporation for Money Due—Resolution of Council Authorizing Payment—Refusal of Mayor to Sign Cheque—Action by Claimants for Mandamus — Adequate Legal Remedy by Action against Corporation.

Action for a mandamus to compel the defendant, the mayor of Portage la Prairie, to sign a cheque in favour of plaintiffs.

A. Meighen, for plaintiffs.

C. P. Wilson and E. A. McPherson, for defendant.

MATHERS, J.:—This was an action tried before me at Portage la Prairie. The plaintiffs were making a claim against the city of Portage la Prairie for money which the defendant, as mayor of the city, appeared to think they were not entitled to. At a meeting of council held on 23rd December, 1907, a resolution was passed for the payment to the plaintiffs of the amount claimed. Pursuant to the power vested in him by sec. 39 of the charter of the city, the mayor vetoed this resolution. At the next regular meeting of the council held on 6th January, 1908, there were only 4 members of the council present. The council consists of the mayor and 6 aldermen, so that 4 constituted a quorum. One of the 4 was voted to the chair in the absence of the mayor, and a motion was then introduced to overrule the mayor's veto of the resolution previously referred to. On the motion being put, the 3 members present voted for it. Pursuant to that resolution, the city clerk drew a cheque in favour of the plaintiffs upon the city's bank account for the amount named in the previous resolution, and presented it to the mayor for his signature. The mayor, however, refused to sign, and this action was brought for a mandamus to compel him to do so.

The ground on which the mayor refused was that it requires a two-thirds vote of the whole council to overrule his veto, and not only two-thirds of those who happen to be present.

Counsel for the defendant took the objection that a mandamus will not lie if there is another adequate remedy; that in this case there is another adequate and effectual remedy by an action against the city. It was said in answer to this contention by counsel for the plaintiffs that there might not in this case be another remedy, because there might be some technical objection to the plaintiffs succeeding against the town. The plain and complete answer to that contention, it seems to me, is that a mandamus is only granted for the purpose of enforcing a legal right, and unless there is a legal right then there is no right to mandamus.

It seems to me the objection is well taken. It is laid down in the English Encyc. of Law, vol. 8, p. 529, that the prerogative writ of mandamus will not be granted if there is another effectual legal mode of enforcing the right, and at p. 547 it is stated that the rules relating to the prerogative writ are applicable to an action for mandamus.

If an action for debt will lie, a mandamus will not be granted: The Queen v. Hull and Selby R. W. Co., 6 Q. B. 70.

The existence of a legal right or obligation is the foundation of the right to a mandamus. The applicant must make out that there is a legal obligation to pay him the sum he demands, and that he has no remedy to recover it by action: In re Napier, 18 Q. B. 695.

Upon an application to compel the registrar of joint stock companies to file a contract, which he refused to file on the ground that it was not sufficiently stamped, it was held that, as the applicant had a right to question the registrar's refusal by obtaining the opinion of the Commissioners of Inland Revenue and appealing therefrom to the High Court, there was another appropriate remedy, and mandamus was refused: The Queen v. Registrar of Joint Stock Companies, 21 Q. B. D. 131.

The mere fact that the other remedy is not against the defendant in the mandamus proceeding does not prevent the rule applying. On an application to compel by mandamus the Commissioners of Inland Revenue to pay to the applicant the amount of duty overpaid by him, it was

held by the Court of Appeal that, as he had a complete remedy by petition of right against the Crown, the mandamus should be refused: The Queen v. Commissioners of Inland Revenue, 12 Q. B. D. 461.

In this case, if the plaintiffs have the legal right to the payment of the moneys in question, they have an adequate remedy therefor by action against the city corporation. If they have not a legal right to this payment, then they have no right to a mandamus.

As this point decides the action, it is not necessary to consider the other question. The action must be dismissed with costs.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

EMPEROR OF RUSSIA v. PROSKOURIAKOFF.

Attachment of Goods — Absconding Debtors—Action for Money Demand—Jurisdiction of Court—Cause of Action —Foreigners — Domicile—Rules 201, 202—Tort—Conversion of Money abroad—Detention in Manitoba—Contract—Motion to Set aside Order of Attachment—Service of Papers—Statement of Claim—Substituted Service—Personal Service on Foreigners in Jurisdiction—Affidavits—Defendants out of Jurisdiction—Temporary Residence in Jurisdiction—Rule 183.

Two appeals by plaintiff from orders of MATHERS, J.

The first appeal was from an order setting aside an order for an attachment made by the Referee in Chambers, 7 W. L. R. 766.

The second appeal was from an order setting aside an order of the Referee in Chambers allowing substitutional service of the statement of claim upon the defendants, 8 W. L. R. 10.

The statement of claim shewed that His Majesty the Emperor of Russia sued the defendants, Ivan Proskouriakoff and Anna Zeman, in respect of the following causes of action. It was alleged that the defendant Proskouriakoff,

while acting as treasurer of the district of Tachkent, in the province of Turkestan, embezzled a large sum of money, the equivalent of about $160,000, and appropriated the same to his own use. It was alleged that Proskouriakoff came to Manitoba and purchased real estate here with part of the money, which real estate he afterwards transferred without consideration to his co-defendant.

The plaintiff sought: (1) to recover judgment for the sum of money so appropriated and interest, or as money had and received to the plaintiff's use, or as money of the plaintiff converted to the use of the defendant; (2) a declaration that the defendant Zeman was a trustee for Proskouriakoff of the lands in question, and an order for their sale for the benefit of the plaintiff; (3) an order for the delivery to the plaintiff of certain goods and chattels alleged to have been purchased with part of the funds so embezzled.

The plaintiff sought to make out a case for an attachment under paragraphs (a) and (c) of Rule 815. The affidavits alleged that the defendants had departed from Manitoba to avoid being arrested, or served with process, or with intent to delay, defeat, or defraud their creditors, of whom the plaintiff was stated to be one. They further alleged that the deponents had reason to believe and did believe that the defendants were about to remove or transfer their property, effects, etc., with intent to delay, defeat, or defraud the plaintiff.

The appeals were heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

J. E. O'Connor and H. P. Blackwood, for plaintiff.

A. B. Hudson and E. R. Levinson, for defendants.

HOWELL, C.J.A.:—The facts relating to the two motions are fully set out in the judgments of my brother Judges.

The right to serve process out of the jurisdiction is not inherent in the Court; it depends solely on the statute: Re Anglo-African Co., 32 Ch. D. 350. The question is also discussed by the English Court of Appeal in the same volume in Re Bushfield, at p. 31, and the law is stated as follows: "Service out of the jurisdiction is an interference with the ordinary course of law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction . . . but, apart from

the statute, a Court has no power to exercise jurisdiction over any one beyond its limits."

An examination of the case of Pennington v. Morley, 3 O. L. R. 517, 1 O. W. R. 246, shews how closely the Ontario Courts criticize the statute to find if, in clear terms, jurisdiction has been conferred.

It is upon the plaintiff to establish that the Court has jurisdiction.

I think with my brother Perdue that the power of attorney of 14th January, which was not before Mr. Justice Mathers, furnishes further inferences against the plaintiff's contention. It seems to me impossible to read the material and come to any other conclusion than that the defendant, a refugee from justice, passing under an assumed name, discovered that the criminal law was about to be put in motion which would lead to his extradition to Russia, and fled from Canada with the intention never to return. The woman, his co-defendant, followed him, and both are in Chicago soon after, and there they sign the power of attorney authorizing another person to sell all their property here, thus still further shewing an intention not to return.

This it not the case of domicile of origin, but of choice, and it seems to me he has abandoned his domicile of choice quite as emphatically as his domicile of origin.

It may be said that mere presence in a country is presumptive evidence of domicile, but the very material in this case shews that recently the defendant had another domicile, and the presumption is always in favour of domicile of origin, and the only evidence to shew that he has abandoned that home would equally be evidence of his having abandoned Manitoba.

This subject with all the recent authorities is discussed in a leading article in 32 Law Magazine and Review, and a proposition is thus stated: "Suppose A., an English emigrant, having left England for good, sails for America, where he intends to settle; he has lost his English home, and has not acquired his American home. A. is certainly homeless." With which I entirely concur, and it seems to me it might well be said that the defendants are homeless. I cannot think that the plaintiff has shewn that the defendants were at the commencement of this suit or are now ordinarily resident within Manitoba.

If there appeared from the material any facts by which an intention to return could be inferred, or that the ab-

sence was a merely temporary one, the plaintiff might thereby satisfy the onus which is upon him, but, to my mind, Manitoba and Russia are the last places to which he is likely to return. From rather scanty material the Ontario Court held that there was only a temporary absence with an apparent intention to return in Bonbright v. Bonbright, 1 O. L. R. 629, 2 O. L. R. 249, but nothing can be so inferred in this case.

In regard to the motion to set aside the attachment, I think the order made by Mr. Justice Mathers was properly made, and I follow his judgment.

The material used on that motion shewed the absence of the male defendant from this province, and I would infer from it that he had abandoned his residence here and had no intention to return. It seems to me that if the affidavit required by Rule 817 shews the defendant out of the territorial jurisdiction, it must shew such facts and circumstances as would indicate a right of service out of the jurisdiction under Rules 201 and 202.

Both appeals should be dismissed.

PERDUE, J.A.:—I agree with Mathers, J., in holding that the provisions relating to attachment do not widen the jurisdiction of the Court in respect of actions against persons not domiciled or ordinarily resident in Manitoba.

The affidavits filed by the plaintiff on obtaining the order for attachment state specifically that the defendants are not domiciled in this province. The facts are shortly these. Both defendants were domiciled in the Russian dominions up to the latter part of the year 1906; the defendant Proskouriakoff embezzled a large sum of money and fled from Russia about the end of that year; shortly afterwards the female defendant followed and joined him and lived with him as his wife. Since then they have been wanderers and fugitives. They appear to have been in different countries and provinces temporarily until the autumn of 1907, when they came to Winnipeg. Proskouriakoff then bought a house, purchased a considerable stock of goods, and rented a store, evidently with the intention of residing and carrying on business here. This intention, however, would always be subject to this qualification in the mind of a fugitive from justice, that if he had reason to fear arrest he would continue his flight and at once terminate his residence in the place where danger threatened him. It appears

from the material used by the plaintiff on the application, that the Russian government had discovered that the defendants were in Canada, and was taking steps in November, 1907, to extradite Proskouriakoff. It is probable that he in some way heard of this, and in the following month he disappeared from Winnipeg, leaving his house, store, and stock of goods. A few days afterwards the female defendant also left, and appears to have gone to him. As is stated in one of the letters furnishing the information upon which the plaintiff's solicitors acted, the defendants learned of certain proceedings which were being taken, and "skipped." The two defendants were in Chicago on 14th January, 1908, as appears from powers of attorney which were executed by them on that date. The action was commenced on the 24th of the same month.

The affidavits filed by the plaintiff state that the deponents have reason to believe and do verily believe that the defendants have departed from Manitoba to avoid being arrested or served with process, or with intent to delay, defeat, or defraud their creditors. The departure of Proskouriakoff from the province is shewn to have taken place about 23rd December, 1907, and that of the other defendant a couple of days later. If they left Manitoba with intent to avoid arrest, it is scarcely credible that they will return. Their residence in this province must, therefore, upon the shewing of the plaintiff, be taken to have terminated in December, 1907, about a month before this action was commenced.

If a defendant can be served with a statement of claim in this province, the Court has jurisdiction, no matter where the cause of action arose. But if a party be sued in this province, and it is sought to serve him outside the jurisdiction, then the case must be brought within one of the provisions of Rules 201-202. It is to be observed that these Rules do not confer jurisdiction; they simply set forth the instances in which service of the statement of claim outside the province will be allowed.

So far as the present is an action for conversion of the plaintiff's property, or for a money demand, it can only be brought within clause (c) of Rule 201; that is, where "any relief is sought against any person domiciled or ordinarily resident within Manitoba." The term "ordinarily resident within Manitoba" simply means that the person so de-

scribed has his ordinary or usual place of living within that province, that he lives within the province more than he does elsewhere: see Re Erskine, 10 Times L. R. 32; Dicey on Domicile, p. 76. If such person departs from Manitoba under circumstances which render it unlikely that he will return, he is no longer ordinarily resident within the province.

Counsel for the plaintiff laid much stress upon the form of the powers of attorney executed by the defendants in Chicago on 14th January, 1908, in which they described themselves as " of Winnipeg, Man., Canada." These powers of attorney were given to one Popoff, of Winnipeg, apparently for the purpose of enabling him to take charge of and deal with the defendants' property there. This rather shews that the defendants had no immediate intention of returning to Manitoba. I do not think that the description of the defendants as being of Winnipeg helps to shew that they were still residents of Manitoba, or so regarded themselves when the powers of attorney were signed. The description appears to me to have been added merely for the purpose of identification. I think the giving of the powers of attorney shews that the defendants had left Manitoba and desired to close up their affairs in this province.

If a party has fled from Manitoba, from whatever motive, there is always the possibility of his return, and if he does return and is served while in this province the Court has jurisdiction over him. But in a case where it is sought to issue an order for attachment against the defendant as an absconding or concealed debtor, or as one who has transferred or is about to transfer his property in order to defraud his creditors, it must be shewn that the person applying has a cause of action enforceable by the Court, one in respect of which the Court then actually has jurisdiction: Rules 815, 817. It is not enough to shew that a cause of action arose in a foreign country between two persons who were then residents of that country, unless it is shewn that the defendant is domiciled or ordinarily resident in this province so that the Court has jurisdiction over him.

I think that Mathers, J., was right in holding that there was no tort committed by the defendants against the plaintiff in Manitoba, and that if the plaintiff has a claim against the defendants arising out of a money demand, it arose in a foreign country and not in this province. There was, therefore, no cause of action within the jurisdiction

of the Court of King's Bench upon which an order for attachment could be founded. No case was made giving jurisdiction under Rule 202. The Court, no doubt, has jurisdiction in respect of the plaintiff's alleged right against the land referred to in the statement of claim, but that is not sufficient to support an application for an attachment.

It appears to me that the whole procedure relating to attachment as set out in the Rules of Court requires remodelling. When first introduced by 38 Vict. ch. 5 (Man.), this remedy was confined to cases of debt or money demand. Afterwards it was sought to extend it to claims for damages. If the plaintiff is tempted to apply for an attachment in an action for damages, he is required by the Rules to swear to the exact sum in which the defendant is liable to him for damages, "after making all proper and just set-offs, allowances, and discounts." It appears to me that no person can properly make such an affidavit unless the damages have been settled, liquidated, or adujsted in some way, Rule 839 contains the strange provision that before the plaintiff shall be entitled to sign judgment by default (where an attachment has been issued) he shall file an affidavit proving the amount of the debt and damages. Final judgment in the case of an action for damages cannot be signed in default of a defence. The judgment in such a case is only interlocutory, and the plaintiff has to set the case down for assessment and has to prove his damages before the Court: Rule 587. This shews that the amendments seeking to make the procedure for attachment applicable to actions for damages were imperfectly and somewhat carelessly introduced into a measure which was not intended in the first place to apply to such actions.

The appeal from the order of Mathers, J., setting aside the order for attachment, should, I think, be dismissed.

I think the second appeal should also be dismissed. If the plaintiff confines his case wholly to the subject matter of the land in question, there would be power to grant service outside the jurisdiction under Rule 201, paragraph (a), but, if other causes of action are included, then the Court would not have power to grant such service under the last mentioned paragraph. The plaintiff has, for the reasons above set out in dealing with the first appeal, failed to bring the case within paragraph (c) of Rule 201. If the plaintiff brings an action in this province against a party who is not in the province, the onus is thrown upon

the plaintiff of shewing that the Court has jurisdiction. I quite agree with the reasons given by Mathers, J., in setting aside the order of the Referee allowing substitutional service. I think, therefore, that the second appeal should also be dismissed.

PHIPPEN, J.A.:—The defendant Proskouriakoff is an absconding Russian, who embezzled a large amount of government funds. The statement of claim, after alleging the crime, claims an account and payment of the money taken, and in the alternative damages for conversion. It then alleges that the absconding defendant purchased, with a portion of the stolen money, certain valuable real estate in Winnipeg, which he subsequently conveyed to the defendant Zeman without consideration, and to the knowlege of Zeman, "in order to prevent the plaintiff from recovering, or receiving the benefit of, the lands or the sums of money represented thereby, and to protect the defendant Proskouriakoff's fraud and to effectuate his unlawful object of defrauding the plaintiff's claims and for the purpose of defrauding the plaintiff." Further "that the defendants have, out of the said (stolen) moneys made large purchases at different times and from different persons of various goods and chattels which are now in Winnipeg, or elsewhere within the jurisdiction of this Court." The relief sought is an account and payment; an order for the delivery or the sale of the goods and payment of the proceeds to the plaintiff; a declaration that Zeman is a trustee of the lands for the defendant Proskouriakoff, and an order setting aside the conveyance to Zeman; a sale of the lands, and payment to the plaintiff. In the alternative, a declaration that the defendants have no interest in the lands as against the plaintiff: an order to convey; and damages for detention and conversion of the stolen money.

Shortly after the statement of claim was filed, an attaching order was issued, under which the goods are now held. Thereafter the plaintiff obtained an order for substitutional service of the statement of claim. On the defendants' application, both these orders were set aside, on the ground that this action was not within the jurisdiction of the Court, whereupon appeals were brought to this Court.

Although the arguments were separate (the appeals having been entered at different times) the material and

legal questions involved are so nearly identical as to permit of their being best disposed of by one judgment.

On the material filed it appears that the defendant Proskouriakoff absconded from Russia about the end of December, 1906, taking with him his co-defendant Anna Zeman. Up to 27th August, 1907 (at least), the defendants wandered from place to place with nothing approaching a fixed habitation. Some time thereafter (the exact date is not stated) they came to Winnipeg, where Proskouriakoff purchased and furnished a valuable house, the title to which he transferred to Zeman, the two living together in the house as man and wife.

The defendant Proskouriakoff while in Japan bought a stock of goods valued at about $50,000. These goods he brought to Winnipeg, paying some $2,000 customs duty. They were placed in a store which Proskouriakoff rented; he evidently intended to open up a retail business.

From enquiries made at the defendants' house on 3rd January it was learned that the defendants had left Winnipeg just before Christmas and were expected back "next week." On 14th January each defendant executed a power of attorney, in which they severally described themselves as "of Winnipeg, Manitoba, Canada, who was in Chicago, Illinois, on this date."

These powers of attorney were not before the learned King's Bench Judge when he made the orders appealed from, they having been subsequently discovered by the plaintiff's attorney, and admitted as additional material on the argument of the present appeals.

As this case presents itself to me, the only material question is whether, under the aforesaid circumstances, the Court of King's Bench has jurisdiction to entertain this action. If so, substitutional service of the statement of claim should be allowed. If not, the appeals should be dismissed.

It was not argued that service of the statement of claim as at present framed could be allowed under Rule 202. It includes a claim for damages for conversion, taking it out of the scope of that Rule.

Rule 201 permits service of a statement of claim out of the jurisdiction wherever (c) "any relief is sought against a person domiciled or ordinarily resident within Manitoba." It is not contended that the defendants are domiciled with-

in the province. Were they on 28th January, 1908, when this action was commenced, ordinarily resident within Manitoba?

I think a person can be domiciled only in the place where he has his permanent home. He may be ordinarily resident where he has his temporary abode, or rather, in the place which is his then principal, although not necessarily permanent, residence. "So where a party moves to another country to avoid the inconvenience attending a residence in his own, he does not intend to abandon his ordinary domicile or to acquire a new one in the country to which he goes to avoid such inconvenience:" De Boneval v. De Boneval, 1 Curt. 856. Perhaps it would be more accurate to say that, on evidence of such facts alone, he would be presumed to retain an intention of returning to his original domicile.

I would accept the identification of "domicile" given in the Oxford Dictionary: "The place where one has his home, or permanent residence, to which, if absent, he has the intention of returning." The distinction between "domicile" and "residence" or "ordinary resident" is therefore largely one of mental condition or intention. Domicile, other than the domicile of birth or parents, implies a personal intent. Residence is a question of fact. Dicey draws the distinction, at p. 76 of his work on Domicile, when he says (note L): "It may be well to note again that residence is often used as including the animus manendi and hence as equivalent to home or domicile."

The onus is on the plaintiff, who seeks jurisdiction under clause (c) of Rule 201, to establish the defendants as ordinarily resident within the province. Has he done so in the present case? The defendant Proskouriakoff leaves Russia to escape the criminal law. After months of wandering he purchases a house and establishes a home in Winnipeg. He brings a valuable stock of goods to the city with the apparent intention of opening a store; he leaves Winnipeg, for reasons which he does not disclose, but which are quite consistent with a temporary business absence; 3 weeks later in Chicago he executes a power of attorney, describing himself as of Winnipeg, at present in Chicago. As to the defendant Zeman she accompanied Proskouriakoff as his wife, and I think should be assumed to adopt from time to time the same residence as the man with whom she lives.

Had the statement of claim been filed before 14th January, the date on which the powers of attorney were executed, these facts, I have no doubt, would have constituted a prima facie case of ordinary residence, within the Rule as of that date.

Is that presumption rebutted by the lapse of 14 days before the filing of the statement of claim, no evidence being given by either side of the defendants' interim whereabouts or intentions? Should we hold that because the defendants have remained abroad for several months since the commencement of this action, they have thereby established an intent present in their mind on 28th January to abandon the home which they apparently recognized so late as the 14th. If we assume from the fact of the defendants leaving Winnipeg in the latter part of December, and since remaining out of Manitoba, that they have ceased to be ordinarily resident in this province, should we carry that presumption back to a date as early as the commencement of this action? I think not.

It was strongly argued that the defendant Proskouriakoff being a fugitive from justice, and his co-defendant being his accomplice, we should infer an intent to abandon his home when he left Winnipeg in December. Personally I would refuse to overbear the prima facie case made by the plaintiff, by presuming a state of mind in the defendants favourable to their own interests. The defendants have been represented by counsel throughout these proceedings. They stand charged with fraud committed or attempted within Manitoba. This charge they have neither denied nor explained. To my mind, the only question to determine is, has the plaintiff made a prima facie case against the defendants as being ordinarily resident within Manitoba at the commencement of this action? If so, that case is not met by the defendants remaining out of the province until the present time, nor should this Court presume an intent favourable to the defendants based upon their previous criminal conduct. If the defendants wish to overcome the prima facie case raised by their acquiring a home, by their opening a store, and by their description in the powers of attorney, they must do so by evidence more forcible than assumption from criminal culpability. I think the plaintiff has established a prima facie jurisdiction under clause (e) of Rule 201. This being so, the attaching order cannot be questioned.

I would allow both appeals with costs. As the powers of attorney were not before the learned King's Bench Judge, I would not allow either party costs of the appeals to that Judge.

RICHARDS, J.A., concurred with PHIPPEN, J.A.

The Court being divided, both appeals were dismissed without costs.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

MEY v. SIMPSON.

Vendor and Purchaser — Exchange of Lands — Fraud and Misrepresentation—Warranty as to Value of Land—Evidence — Verbal Representations — Reliance on Agent's Opinion—Action for Damages for Deceit.

Appeal by plaintiff from the judgment of CAMERON, J., dismissing the action with costs.

In December, 1906, plaintiff sold a farm he owned in the parish of St. Agathe, Manitoba, to the defendant, partly for cash and partly in exchange for other lands which defendant owned, which lands defendant represented to be good farm lands worth $9 an acre. Plaintiff subsequently discovered that the representations made by defendant were, as he alleged, untrue, and that the lands were not worth $9 an acre. He brought this suit to recover the damages he had sustained by reason of the representations made by defendant.

The case was tried before CAMERON, J., who dismissed the action with costs, holding that no contract or warranty such as was alleged in the statement of claim had been established; that the expression "good farm lands" and other expressions used in the evidence were used not as representations which induced the contract, but as expressions of opinion. There was no fiduciary relationship exist-

ing between the parties, and there was no reason why the plaintiff or his agent should not have inspected the lands.

The appeal was heard by HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.

H. Phillipps and H. W. Whitla, for plaintiff.

H. A. Burbidge, for defendant.

HOWELL, C.J.A.:—This was an action brought by a vendor against a purchaser for breach of warranty and deceit on the sale of the lands whereby the plaintiff was induced to take in part payment of his lands about 900 acres of the lands of the defendant. In the statement of claim it is alleged: "The defendant represented and warranted to the plaintiff that the said lands were worth the sum of $9 per acre, that all the said lands were good farm lands, consisting of good soil and well located and readily saleable, and the said lands were first-class lands; and the defendant made these representations and warranty in order to induce the plaintiff to accept the same in lieu of cash in part payment of the farm of the plaintiff as aforesaid." This allegation was followed by alleging breaches of the warranty and representation. And then follows a further allegation: "And further, in the alternative, the plaintiff says that the defendant made the representations fraudulently, and either well knowing that the same were false, or recklessly and not caring whether they were true or false."

It appears that the transaction was executed by the plaintiff conveying his property to the defendant and by the defendant paying over the cash portion of the purchase price and by conveying his lands which were agreed to be taken in part payment, and thus the whole transaction was completed.

In the argument of the case before this Court the plaintiff put his right to recover solely on the ground of deceit, following the principles laid down in Joliffe v. Baker, 11 Q. B. D. 265. It appears that the plaintiff had nothing whatever to do with this transaction. Mr. Erzinger of Winnipeg had his full power of attorney to sell and dispose of this land, and the plaintiff did whatever Erzinger advised.

The allegation in the statement of claim is that these representations were made to the plaintiff, and there is no mention of representations made either to Erzinger or to Sirqu in any of the pleadings. It appears clear from the

evidence that Sirqu was employed by the plaintiff personally to endeavour to make a sale of this land, and he appears to have been to some extent a land dealer and was to receive $1,000 if a sale was made. He, however, states in his evidence that the sale that was in fact carried out turned out so badly that he has not asked for any pay.

Sirqu first saw the defendant in October, 1906, and endeavoured to persuade him to purchase this property, and he appears to have gone from the defendant to Erzinger with offers and counter-offers, and he swears that the defendant offered $50,000 in cash for the plaintiff's land, and that subsequently he withdrew from this offer and offered about 900 acres of lands in part payment and some mortgages and cash for the balance.

During this time the defendant and Sirqu had frequent conversations about the defendant's lands which he proposed to transfer in part payment of the purchase price, and it seems clear that Sirqu brought the defendant to Erzinger on two or three occasions, and there were representations, it is alleged, made by the defendant to Erzinger on those occasions. It is, therefore, necessary to consider the representations made by the defendant to Sirqu, some of which were repeated to Erzinger, and representations also made by the defendant to Erzinger directly.

It appears that after Sirqu got the description of these lands he discussed their value and location with Mr. Scott, a well-known real estate agent here, and he apparently reported the result of this interview to Erzinger, and I assume that Sirqu himself must have had some knowledge respecting the value of these lands.

Sirqu, in his evidence, gives several different versions of what the defendant said. He swears that he first discussed this matter with the defendant in October. The sale was not consummated until 9th December.

He swears that the defendant first offered $50,000 in cash for the property, and after waiting for several weeks he went back again, and this is his evidence: "Then I came back to Mr. Simpson again, and Mr. Simpson at that time did not seem to want the place any more. I would judge so. I do not remember exactly whether the $50,000 were brought up or not, but I take it for granted that it was."

He says he was going backwards and forwards between the defendant and Erzinger, and one time defendant called

him back and this is what Sirqu swears took place: "He told me that he had several parcels of land, and if we would take these in as part cash he would probably deal with them."

This was followed by Sirqu getting a description of the land and a part of the provincial map shewing their location.

The following is a further portion of his evidence:—

"Q. Did Mr. Simpson say anything to you about the quality of those lands? A. Yes.

"Q. What did he say? A. It was a fairly good lot of land. We were discussing parcels separately."

One of the farms is known as the Dauphin farm. Sirqu swears that the defendant told him that there was grain raised on the land, and that it was an improved farm. He also told him that some of the land was got in a horse trade and some bought at tax sales.

He further states that he did not ask the defendant then about the quality of the soil of the Dauphin farm. One of the lots is known as the Lake Winnipeg farm, and Sirqu says the defendant told him this was the worst farm of the lot. and Sirqu also says that he thought from the map that the lot fronted on the lake, and if so it was valuable because of location, but he does not pretend that the defendant so represented it.

Sirqu swears again as to the defendant's representations as follows:—

"Q. What kind of lands did he tell you these were? A. After several of these being described, the Dauphin as lot No. 2, that of Lake Winnipeg being the worst, taking it all through was a fairly good lot of farm land."

Again in the evidence:—

"Q. And in all these 20 or 30 interviews you had with Mr. Simpson the most you can remember he said about the lands is that they were a fairly good lot of farm lands? A. Yes.

"Q. And that is about the sum total of all he said during all these numerous interviews? A. I had to rely upon him solely because I could not inspect the land.

"Q. That is what he said? A. Yes. He described the parcels to me separately and what he had paid, but as a whole it was a fairly good lot of farm lands."

Erzinger swears that he relied upon the statements made by Sirqu and by the defendant, and that he carried

cut the sale because he relied upon the statements made by these two men.

A careful scrutiny of the evidence leads me to believe that Erzinger seemed to rely quite as much upon Sirqu's representations as upon the defendant's.

The following is a question and answer in Erzinger's evidence: "Q. Did you ask Mr. Simpson what kind of land that was? A. I think I did." He further says that he will not say whether the defendant ever stated that he had ever seen any of these lands.

Erzinger did not know the defendant till these negotiations commenced. Erzinger further says that Sirqu made certain statements in the presence of the defendant. His evidence is as follows:—

"Q. Did he say anything about them in Mr. Simpson's presence? A. Yes, he said they were good lands.

"Q. Anything else? A. No, Sirqu seemed to be under the impression that we had better take the land.

"His Lordship: Q. Did he say that? A. Yes, he said that, that was his answer at the time; that we were making a good deal and that we could dispose of the land at any time we wanted."

And finally in cross-examination Erzinger gives the following evidence:—

"Q. What things are you certain about? A. I am certain about him mentioning the Dauphin being fine land, specially good.

"Q. Anything else? A. About the other lands I don't remember. They discussed with respect to the quality specifically. The lands were mentioned in general as a whole and being good lands, do you see.

"Q. Was there anything said about the soil and the quality of the land other than what you have stated? A. I don't think so."

Sirqu in his evidence was asked as to what was said by Simpson to Erzinger:—

"Q. In your presence did he say anything about the Dauphin lands, for instance, to Mr. Erzinger? A. I cannot say whether they were mentioned; whether the parcels were individualy discussed; but that the lands were worth the money that he was putting in and so forth, was said.

"Q. Simpson told Erzinger that? A. Yes.

"His Lordship: That is the term as it were terms of the bargain? A. The price of the land, it was fair value and so forth.

"Q. Did Mr. Simpson say anything to Erzinger about the kind of lands they were in your presence? A. No, no more than it was a good lot of land and so forth.

"Q. He said that? A. Yes.

"Q. A good lot of land? A. Yes, a good lot of land. It was always expressed as farm land, and we supposed to get farm land."

The plaintiff put in as part of his case a portion of the cross-examination of the defendant by way of discovery, and amongst that evidence is the following:—

"We talked about paying cash at one time, but my brother was going in with me at that time, Dr. Simpson, and he did not go in after, and then we made another deal."

And further on:—

"Q. Now in regard to that Sifton piece, did you tell him that was improved? A. I told him it was homesteaded one time. The man told me it was homesteaded, but I expected the buildings was all tumbled down, I understood.

"Q. Did you ever see that land? A. No.

"Q. And these lands in the Brokenhead district, you had never seen these either? A. No, I had never seen them. I bought part of them for taxes.

"Q. You did not know at the time that a large part of these Brokenhead lands were swamp and utterly useless? A. I did not know what kind of lands they were.

"Q. And you don't know anything about this land on Lake Winnipeg nor Whytewold Beach? A. No, I never saw it."

At the conclusion of the evidence it was urged by the defendant's counsel that no case had been made out, and the trial Judge dismissed the action with costs.

The pleadings must set forth the fraud alleged clearly and distinctly, and the party who alleges it must clearly and distinctly prove it as alleged. "Fraud must be established beyond reasonable doubt:" Beatty v. Neelon, 13 S. C. R. 5.

In the mass of allegations of fraud, the only portion which it can be pretended there is evidence upon is that the lands were good farm lands, and the statements on that point in the evidence are most conflicting.

Sirqu swears that the representation was "as a whole it was a fairly good lot of farm lands," although he states

it differently in other parts of his evidence—at one place he states it to be "a fairly good lot of land." Erzinger does not pretend that the quality of the soil was mentioned, but says the defendant stated it was good farm land. However, in cross-examination his evidence of the representations and warranty is extremely vague.

The allegations in the pleadings are that the representations were made to the plaintiff, but there is no pretence that such was the fact, and evidence as to the representations to Erzinger and Sirqu were strongly objected to.

It is not pretended in the evidence that any statements made by the defendant were so made because he had actually seen the land. It is common knowledge that in dealing with wild land in this country, those who offer it for sale have porbably never seen it, and only know of its quality from general reputation or opinion. Erzinger does not claim or pretend that the defendant ever saw these lands, and I would have thought that where he was dealing with a man who was offering wild lands for sale that any representation as to their quality would have been considered only the opinion of an anxious vendor.

The law, it seems to me, on this question of intended warranty is very well stated in De Lassalle v. Guildford, [1901] 2 K. B. 221: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not."

As above stated, the plaintiff put in the examination of the defendant as a part of his (plaintiff's) evidence, and amongst other things the defendant therein stated that he had not seen the lands and did not know what kind of lands they were. Can it be said then that the defendant did more than give an exaggerated opinion of the general quality and value of these lands? And can it be said that Erzinger expected that the plaintiff would have special knowledge as to their quality? It seems to me the utmost that can be urged against the defendant is that he said they were on the whole a fairly good lot of lands. It does seem to me this is a mere matter of opinion upon which Erzinger was to use to some extent his own judgment, and

he certainly did seem to rely upon the judgment of Sirqu, who himself endeavoured to form some opinion upon their value.

This evidence was given of mere verbal representations made more than a year before, and it does seem to me unsafe to conclude that a charge of fraud has been established by evidence of that character.

I think the appeal should be dismissed with costs.

PERDUE, J.A., concurred.

RICHARDS, J.A.:—It is with regret that I am unable to concur in the opinion of the majority of the members of the Court who heard this appeal. But on a careful consideration of the evidence it seems to me that the plaintiff's agent Erzinger does shew in effect that the defendant in order to induce him to accept in part payment for the plaintiff's farm the 900 acres taken in lieu of $8,000 of the purchase money, represented to him that those 900 acres were good farming land. I think Erzinger also shews that he was induced by those representations to so take the 900 acres in such part payment. The evidence clearly shews that at least a considerable portion of the 900 acres was not good enough land for farming purposes.

In my opinion, therefore, the learned trial Judge should not have nonsuited the plaintiff.

I would allow the appeal and set aside the nonsuit, and order a new trial.

Appeal dismissed.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

STEWART v. HALL.

Costs—Settlement of Action—Collusion—Depriving Plaintiff's Solicitor of Costs—Order for Payment of Costs by Defendants.

Appeal from decision of CAMERON, J.

In April, 1907, the plaintiff, while residing in Portage la Prairie, became indebted to defendants, a firm of mer-

chants, in the sum of $50.15 for goods sold to him. The plaintiff obtained a situation in Winnipeg, and decided to remove there with his family and household goods. The defendants issued a writ of attachment against him in the County Court of Portage la Prairie, on the ground that he was removing his property out of the province, with intent to defraud his creditors, and caused his effects to be seized in a car in which they had been loaded for removal to Winnipeg. The plaintiff applied to the Judge of the County Court and obtained from him an order setting aside the writ of attachment. He then commenced this action in the Court of King's Bench, claiming damages against the present defendants for maliciously and without reasonable and probable cause issuing the writ of attachment against him. A defence was entered and notice of trial given for the assizes at Winnipeg held on 2nd July, 1907. On 29th June, 1907, the defendant Thomas J. Hall was examined for discovery, and on his refusal to answer certain questions the examination was adjourned for 10 days to enable the plaintiff's solicitor to move to compel him to answer. It was generally known that the civil list of cases would not be taken up at that assize for some time, owing to the fact that there were many criminal cases to be disposed of.

Shortly before 2nd July, 1907, one William Mawhinney had a conversation with defendants' solicitor in which the question of a settlement was discussed. The result of the conversation was that Mawhinney went to Winnipeg, saw the plaintiff, and effected a settlement of the suit, defendants paying plaintiff $50 in money and giving him a discharge of his indebtedness to them. This was effected without the knowledge of the plaintiff's solicitor. The latter subsequently demanded from the defendants payment of his bill of costs. Upon payment being refused, he made an application to a Judge in Chambers to compel the defendants and their solicitor to pay his costs of conducting the suit, on the ground that the settlement was made collusively for the purpose of depriving the plaintiff's solicitor of his costs. The application was dismissed by CAMERON, J., and the present appeal was brought from his decision.

B. L. Deacon, for the appellant, the plaintiff's solicitor.

W. M. Crichton, for the respondents, the defendants and their solicitor.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), was delivered by

PERDUE, J.A.:—It appeared from the affidavits filed and the letters produced that defendants' solicitor had been very anxious to obtain a settlement of the suit. Shortly after it was commenced he opened negotiations with the plaintiff's solicitor for the purpose of effecting a compromise. He came to Winnipeg and made an appeal upon personal grounds to the plaintiff's solicitor to settle the suit. The defendants apparently were blaming him, their own solicitor, for having got them into trouble, and he was afraid he would suffer in consequence of it. Plaintiff's solicitor at this interview said that if the defendants would write off their claim against the plaintiff and pay $50 and the costs, he would recommend the acceptance of this as a settlement. This offer was declined. On 8th June, shortly after this interview, defendants' solicitor wrote to the plaintiff's solicitor again, appealing, on account of his personal position which he reiterated, to settle the suit on the basis of an offer which he enclosed. This offer is as follows:—

"Dear Sir,—Rather than have any trouble in this matter, I offer to pay the $50 and write off the claim against Stewart in settlement. Would you kindly accept this offer as a tender in any event, as I make myself responsible?

"Yours truly,

....."

This offer was not accepted by plaintiff's solicitor, who proceeded with the suit. It will be seen that the only difference between the parties was the question of the plaintiff's costs of the suit.

Notice of trial was given by the plaintiff's solicitor, and the case was entered for trial at the assizes commencing on 2nd July.

A few days prior to the last mentioned date, the defendants' solicitor had an interview with Mr. Mawhinney in which he told him about the suit, and the question of getting it settled was discussed between them. Mawhinney was examined under oath, and his examination formed part of the material used on this motion. It is impossible, after reading it, to come to any other conclusion than that he was

chants, in the sum of $50.15 for goods sold to him. The plaintiff obtained a situation in Winnipeg, and decided to remove there with his family and household goods. The defendants issued a writ of attachment against him in the County Court of Portage la Prairie, on the ground that he was removing his property out of the province, with intent to defraud his creditors, and caused his effects to be seized in a car in which they had been loaded for removal to Winnipeg. The plaintiff applied to the Judge of the County Court and obtained from him an order setting aside the writ of attachment. He then commenced this action in the Court of King's Bench, claiming damages against the present defendants for maliciously and without reasonable and probable cause issuing the writ of attachment against him. A defence was entered and notice of trial given for the assizes at Winnipeg held on 2nd July, 1907. On 29th June, 1907, the defendant Thomas J. Hall was examined for discovery, and on his refusal to answer certain questions the examination was adjourned for 10 days to enable the plaintiff's solicitor to move to compel him to answer. It was generally known that the civil list of cases would not be taken up at that assize for some time, owing to the fact that there were many criminal cases to be disposed of.

Shortly before 2nd July, 1907, one William Mawhinney had a conversation with defendants' solicitor in which the question of a settlement was discussed. The result of the conversation was that Mawhinney went to Winnipeg, saw the plaintiff, and effected a settlement of the suit, defendants paying plaintiff $50 in money and giving him a discharge of his indebtedness to them. This was effected without the knowledge of the plaintiff's solicitor. The latter subsequently demanded from the defendants payment of his bill of costs. Upon payment being refused, he made an application to a Judge in Chambers to compel the defendants and their solicitor to pay his costs of conducting the suit, on the ground that the settlement was made collusively for the purpose of depriving the plaintiff's solicitor of his costs. The application was dismissed by CAMERON, J., and the present appeal was brought from his decision.

B. L. Deacon, for the appellant, the plaintiff's solicitor.

W. M. Crichton, for the respondents, the defendants and their solicitor.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), was delivered by

PERDUE, J.A.:—It appeared from the affidavits filed and the letters produced that defendants' solicitor had been very anxious to obtain a settlement of the suit. Shortly after it was commenced he opened negotiations with the plaintiff's solicitor for the purpose of effecting a compromise. He came to Winnipeg and made an appeal upon personal grounds to the plaintiff's solicitor to settle the suit. The defendants apparently were blaming him, their own solicitor, for having got them into trouble, and he was afraid he would suffer in consequence of it. Plaintiff's solicitor at this interview said that if the defendants would write off their claim against the plaintiff and pay $50 and the costs, he would recommend the acceptance of this as a settlement. This offer was declined. On 8th June, shortly after this interview, defendants' solicitor wrote to the plaintiff's solicitor again, appealing, on account of his personal position which he reiterated, to settle the suit on the basis of an offer which he enclosed. This offer is as follows:—

"Dear Sir,—Rather than have any trouble in this matter, I offer to pay the $50 and write off the claim against Stewart in settlement. Would you kindly accept this offer as a tender in any event, as I make myself responsible?

"Yours truly,

....."

This offer was not accepted by plaintiff's solicitor, who proceeded with the suit. It will be seen that the only difference between the parties was the question of the plaintiff's costs of the suit.

Notice of trial was given by the plaintiff's solicitor, and the case was entered for trial at the assizes commencing on 2nd July.

A few days prior to the last mentioned date, the defendants' solicitor had an interview with Mr. Mawhinney in which he told him about the suit, and the question of getting it settled was discussed between them. Mawhinney was examined under oath, and his examination formed part of the material used on this motion. It is impossible, after reading it, to come to any other conclusion than that he was

employed by the defendants' solicitor to go to Winnipeg and effect a settlement with the plaintiff, while the solicitor of the latter was kept in ignorance of the negotiations. Mawhinney was specially well qualified to bring about a settlement. He was a friend of the plaintiff's, and had secured for the latter employment at Winnipeg with the company for which he, Mawhinney, acted at Portage la Prairie. Mawhinney went to Winnipeg on 2nd July, and on the same day arranged a settlement with the plaintiff upon exactly the same terms as are set out in the letter above quoted. This was effected without the knowledge of the plaintiff's solicitor. There was some evidence that Mawhinney used pressure upon and offered inducements to the plaintiff to bring about the settlement. A short memorandum in writing containing the terms of the settlement was signed by the plaintiff. Mawhinney then returned, handed the writing to defendants' solicitor, and received from him $50 and a receipt for defendants' account, amounting to some $50 more. Both the money and the receipt were handed to the plaintiff without communicating with the solicitor for the latter. On 6th July the agents of the defendants' solicitor wrote to the plaintiff's solicitor that the suit had been settled and asked his consent to the case being struck off the assize list. This was the first intimation the plaintiff's solicitor received that a settlement had been made.

Upon careful consideration of the material used upon this motion, one is driven to the conclusion that the settlement was effected without notice to the plaintiff's solicitor with the express object of depriving the latter of his costs. Defendants' solicitor knew that the plaintiff's solicitor's costs incurred up to the time of the settlement would be considerable, that they would in fact exceed the total amount the plaintiff was receiving from the defendants. He further knew that the plaintiff was a person of no means, that it was hardly possible that he had kept his solicitor paid up as he went along, and, even if the plaintiff had done this, that the latter would not be so foolish as to accept in full settlement a sum much less than he had already paid out in costs. The defendants' solicitor was also fully alive to the fact that the only thing that stood in the way of a settlement was the bill of costs of the plaintiff's solicitor. While aware of all this, the defendants' solicitor, with the concurrence of his client, employed Mawhinney to see the plaintiff and effect a settle-

ment with him in person behind the back of his solicitor. The inducement to the plaintiff was that he would receive into his own hands all the fruits of the litigation, and his solicitor would be deprived of any lien that might accrue for his costs, whether as between solicitor and client or otherwise. The defendants, upon the other hand, by avoiding liability for costs, were procuring a better settlement than they could otherwise obtain.

The law upon this question is well settled and does not require any lengthy discussion. The true test is, was the object of the arrangement to deprive the plaintiff's solicitor of his costs? Brunsdon v. Allard, 2 E. & E. 19, per Wightman, J.; Price v. Crouch, 60 L. J. Q. B. 767, per Denman, J.

Parties to a suit may, no doubt, settle between themselves without the knowledge of the solicitors, provided they do so honestly and without any intention of cheating the solicitors of their costs. But the Court will interfere to protect a solicitor where it is clearly made out that there has been some collusion or fraudulent conspiracy between the parties to deprive him of his costs: Re Margetson and Jones, [1897] 2 Ch. 314; The Hope, 8 P. D. 144; Brunsdon v. Allard, supra; Price v. Crouch, supra; Bellamy v. Connolly, 15 P. R. 91.

The language used by Wills, J., in Price v. Crouch may be applied almost verbatim to the present case. He says, at p. 769 of the report: "It is obvious that if the plaintiff's solicitor's costs could be got rid off, better terms could be obtained for the defendant, and the bargain was made with that object. Both the plaintiff and the solicitors for the defendant were well aware that a considerable sum for costs was due, and their conduct shews that they desired to defeat the applicant's claim for them. The defendant's solicitors knew that they could get better terms for their client from the plaintiff, if he left his solicitor out in the cold."

I think it was clearly established that there was collusion in the present case for the purpose of depriving the plaintiff's solicitor of his costs. There should, therefore, be an order that the costs of the plaintiff incurred up to the time his solicitor received notice of the settlement should be taxed, together with the costs of the motion before Cameron, J., and of this appeal, and that the same should be paid by the defendants to the plaintiff's solicitor, the present applicant, forthwith after taxation.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

TURNER v. TYMCHORAK.

Interpleader—Order Attaching Goods—Seizure under—Order Set aside—Withdrawal of Sheriff—Order Reinstated—Reseizure of Part of Goods — Judgment Subsequently Obtained—Proof of—Lapse of Issue—Form of Issue—Onus —Presumption — Judgment on Issue Limited to Goods Seized by Sheriff on Second Occasion.

An action was being tried, in which the present plaintiff had sued one Henry Zas for a considerable sum. On 12th March, 1907, before the trial was ended, Zas sold his chattels to Tymchorak.

On 16th March, 1907, the plaintiff procured an attaching order against Zas's goods, and, under that order, the sheriff seized, in Tymchorak's possession, the goods which the latter had purchased from Zas.

On 26th March an order was made for the trial of an interpleader issue between the plaintiff and Tymchorak, to try the right to the goods.

On 23rd April the Referee set aside the attaching order. But on 16th July, Macdonald, J., made an order, on appeal, reinstating it.

After the attaching order was set aside, the sheriff withdrew from possession of the goods. Tymchorak then got possession and dissipated some of them. After the order of 16th July the sheriff seized again such of them as he found to be still in Tymchorak's possession.

On 23rd May Turner had recovered judgment in his action against Zas.

The interpleader issue, in which Turner had been made plaintiff and Tymchorak defendant, was tried before CAMERON, J., who found in plaintiff's favour.

The defendant then appealed.

A. C. Galt and J. H. Leech, for defendant.

J. B. Coyne and D. Forrester, for plaintiff.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), was delivered by

RICHARDS, J.A.:—The learned trial Judge held that the sale from Zas to the defendant Tymchorak was, with the latter's knowledge, made by Zas with the express intent of defeating and delaying Turner.

There is no reasonable doubt of the correctness of that finding. But the defendant bases his appeal on other grounds.

He contends that the attaching order was got on insufficient material; that the plaintiff should, at the hearing, have proved his judgment against Zas, or the latter's indebtedness to him; and that the issue which had been directed lapsed when the attaching order was set aside by the Referee.

The time to have raised the first of those grounds was when the sheriff interpleaded. The material on which the order had been got was on file, and the claimant could then have taken any objection which he was entitled to raise to its sufficiency. Having let that opportunity go past, and having stood by till the cost of a trial was incurred, he is debarred from making such objection now.

As to the second point. In Holden v. Langley, 11 C. P. 407, there was an issue to try whether goods seized under a fi. fa. were the property of a claimant as against an execution creditor. The verdict was in favour of the latter. The claimant obtained a rule nisi to set aside the verdict, on the ground that the creditor had not proved his judgment on which the fi. fa. issued. The rule was discharged. In giving judgment Draper, C.J., after referring to the practice by which the sheriff brings the claimant and execution creditor before a Judge and an issue is directed, says, as to the issue: "Now, the question which it raises is, not whether the execution creditor had a judgment and a right to issue a writ of fi fa., but whether the goods, during the currency of the writ which has issued, and under which the sheriff seized, were the property of the claimants as against the party who issued the writ. The form of this issue assumes the right of the execution creditor to seize the goods of the debtor named in the writ by virtue of a judgment recovered against the debtor. The claimants undertake to shew that the goods seized are theirs."

Whether the learned Chief Justice, in the above judgment, meant to hold that the claimant could not, under any circumstances, attack the creditor's judgment on the trial of the issue, or merely that, as a result of the issue being directed, the judgment would be assumed until the contrary should be shewn, need not here be discussed. See also Doyle v. Lasher, 16 C. P. 263, and Ripstein v. British Canadian, &c., Co., 7 Man. L. R. 119.

It is not necessary for the decision of this case to decide whether the claimant could, or could not, at the trial, have given evidence to shew that the debt from Zas to the plaintiff did not exist. But I think the cases above cited at least shew that the onus was on him to do so, and that, in the absence of such proof on his part, the existence of the debt is to be presumed from the production of the attaching order.

It was argued that, though the above presumption as to the debt may exist where the creditor is the defendant in the issue, it does not arise in a case, like the present, where the creditor is the plaintiff.

I am unable to see the distinction. An attachment is an execution before judgment; and, for the purpose of an issue to try the rights of a claimant, an attaching creditor is in the same position as a creditor who has issued a fi. fa. on a judgment.

In each case the real question is, whether the claimant is the owner of the goods as against the execution creditor. What difference can there be, in either of such cases, whether the claimant is plaintiff or defendant in the issue?

In Plummer v. Price, 39 L. T. 658, in the Court of Appeal in England, Bramwell, L.J., said: "The form of the issue is of no consequence, because it is directed for the purpose of informing the conscience of the Court."

In Edwards v. English, 7 E. & B. 564, the issue, as framed, was merely to try whether the goods were the property of the plaintiff, the claimant. The evidence shewed the legal title, as against the plaintiff, to be in a person not a party to the issue, but that, as against the defendant, the execution creditor, the plaintiff could set up title. The Court disregarded the form of the issue and found for the plaintiff, holding that the form was immaterial, the purpose of the issue being to inform the Court.

As the issue is only for the above purpose, there can be no doubt, I think, that, at least in a case where the issue is

between an execution creditor and a claimant of goods seized under the execution, the presumption in favour of the existence of the debt, or judgment, should be the same, whether the creditor is plaintiff or defendant.

As to the third point. In Howe v. Martin, 6 Man. L. R. 616, an order directing the trial of an interpleader issue contained a direction that the execution creditor should, within a limited time, give security for the costs of the trial of the issue, or be barred from claiming the goods that had been seized. Security was not given within the limited period. After the time had so elapsed the Referee made an order extending the time for giving the security. On appeal, a Judge discharged the enlarging order, holding that the Referee had no jurisdiction to extend the time, and that the creditor was barred. The sheriff then withdrew from the seizure, and the goods were dissipated. The full Court on appeal restored the Referee's order extending the time. The creditor then moved to rescind the interpleader order. The motion was heard by Killam, J., who dismissed the application, holding that the sheriff was entitled to the protection the order gave for his acts before interpleading, and that the claimant had the right to have his title to the property tried.

The above case is very similar in its facts to the present one. As the application to dismiss was by the creditor, there was of course no discussion in the judgment of his right to have the issue tried. Had the objection to the issue been (as it is in this case) by the claimant, the creditor would, I think, have been held entitled to have the issue disposed of, if only to settle the rights as to costs.

There is in this case the further point that, even if the claimant was entitled to have the issue set aside, he should have applied in Chambers for an order to that effect, instead of going to trial as he did.

I would affirm the judgment of the learned trial Judge, but would limit its effect to the goods seized by the sheriff after the attaching order was restored. The goods dissipated by the defendant, after the setting aside of the attaching order and the withdrawal of the sheriff from the first seizure, may have got into the hands of innocent holders, who may be entitled to hold them as against the plaintiff.

The judgment should be varied in that respect, but the appeal otherwise dismissed. The plaintiff should have the costs of the appeal.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

WHITMAN FISH CO. v. WINNIPEG FISH CO.

Sale of Goods—Perishable Goods — Action for Price—Contract—Place where Property Passed—Place of Delivery—Pleading—Delivery to Carrier—Sale by Sample—Place for Inspection—Right of Rejection—Reasonable Time for Rejection—Retention and Resale of Part—Sales of Goods Act—Counterclaim—Damages—Breach of Warranty.

Appeal by plaintiffs from judgment of CAMERON, J., dismissing the action with costs.

A. C. Galt, for plaintiffs.

C. P. Fullerton and J. P. Foley, for defendants.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

HOWELL, C.J.A.:—This action was brought to recover the price of a car-load of finnan haddie sold by the plaintiffs, through their agent at Winnipeg, to the defendants, who are fish dealers carrying on business in Winnipeg.

It is clear from the evidence that the defendants knew that the plaintiffs carried on the business of salting and curing haddock, converting them into finnan haddie, at Ganso, Nova Scotia.

On 13th November Mr. Connor, the plaintiffs' agent in Winnipeg, sold to the defendants a car-load of finnan haddie, consisting of 800 boxes at 30 lbs. per box, known as "Aberdeen Awa," at $5.90 per 100 lbs., f.o.b. Winnipeg. This car-load arrived in Winnipeg about 16th January, 1907, and was accepted by the defendants, and will be hereinafter referred to as the first car-load.

The next day, the 14th November, 1906, Connor, having received from his principals a sample of "Aberdeen Awa" haddie, shewed it to the defendants, and they then and there ordered a second car-load. The difference in the two sales,

as found by the trial Judge, is that the first one was an ordinary sale of articles to be manufactured, and the second one was a sale by sample.

The plaintiffs in their statement of claim allege their claim as follows: "800 boxes 'Aberdeen Awa' brand, containing 30 lbs. per box, at $5.90 per 100 lbs., to be delivered at Winnipeg, and the plaintiffs agreed to repay any freight which might be paid by the defendants on said car-load."

To this claim the defendants plead, amongst other things, that the sale was by sample; that the finnan haddies did not correspond with the sample; and the defendants rejected and refused to accept the same.

The defendants further set up a counterclaim alleging breaches of warranty, and that the goods were not up to sample; and further that, although they had accepted and paid for the first car-load, it was not up to warranty; and they claim damages for the breach.

It appears that when the second car-load was ordered, Connor, the agent, in the presence of Wall, wrote down the order on a partly printed slip, filling up blanks, which, with the printing and writing, is as follows: —

"Wpg., Nov. 14th, 1906.

"Sold to Winnipeg Fish Co.
Town Winnipeg, Man.
Ship from Canso, N.S. When ship, shortly after 1st car.
How ship, car-load.
Terms 30 days net. Sold by H. G. Connor.

Quantity.	Description.	Price.
800	Boxes Finnan Haddie, 30 lbs. ea. 'Aberdeen Awa' @ $5.90 per 100 lbs. F. o. b. Winnipeg."	

The manager for the defendants, who gave the order, was examined for discovery, and his examination was put in at the trial by the plaintiffs, and on that examination he swore that this writing correctly sets forth the order which he gave. It was apparently read over to him at the examination, and was put in in full in the form of a question, and his answer is: "Yes, that is the order. I cannot say about the date." It therefore seems clearly proved that this exhibit 2 contains the written memorandum of the order made at the time.

It will be observed that there is nothing in the order referring to sale by sample, but evidence was given that preceding the order the sample had been shewn to Mr. Wall, and that he ordered the second car-load because of having seen this sample. The written memorandum is therefore probably incomplete so far as the sale by sample is concerned. The writing does not pretend to be more than a memorandum made by Connor at the time of the sale, and, in so far as it contains the terms of the contract, it is apparently absolutely correct. The order for the first car, given the day previously, is in precisely the same form and exactly the same language, except only the date.

A difficult question of law arises at the inception of this matter on the question of where the property passed, whether at Canso, where shipped, or at Winnipeg, because of the language "f. o. b. Winnipeg." It seems to me, however, that the legal difficulty has been removed by the allegation in the plaintiffs' statement of claim. It is there alleged, as above set forth, that the goods were "to be delivered at Winnipeg." Counsel for the plaintiffs argued that the delivery was at Canso, and asked to have the statement as to delivery in the statement of claim struck out. A large amount of evidence had been taken in Nova Scotia on commission, and the trial took place here without any application to amend at either stage of the case, and the Court thought it unjust to grant the amendment at this stage. If the allegation had been otherwise, perhaps the defendants might have adduced evidence upon the question of property passing. We have therefore to deal with the case on the plaintiffs' statement that the goods sold as in the memorandum set forth were to be delivered at Winnipeg. The contract, therefore, required the plaintiffs to do something at Winnipeg, namely, deliver.

Benjamin on Sales, 5th ed., at p. 355, uses the following language: "Delivery to a carrier is prima facie an appropriation of the goods, but the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery."

This principle is again repeated in discussing sec. 33 of the English Sales of Goods Act, at p. 639, and is declared to be the English law by Lord Herschell in Badische v. Basle, [1898] A. C. at 207.

The Manitoba Sales of Goods Act, R. S. M. 1902 ch. 152, is a copy of the English Act in so far as all matters

arising in this case are concerned, and the English writers and Judges, notwithstanding secs. 32 and 33 of the English Act (which correspond to the Manitoba Act), have uniformly held, it seems to me, that there is nothing in the Act inconsistent with holding that where the goods, pursuant to the contract, are delivered to a carrier to be carried to another place and there to be delivered by the seller to the purchaser, the property does not pass to the purchaser until delivery, although, of course, the deterioration referred to in sec. 33 of the Act, and fully discussed in Bull v. Robinson, 10 Ex. 342, fall upon the purchaser, but any extraordinary damage would be the loss of the vendor.

It was shewn at the trial that a bill of lading of this second car-load, made out at the shipping point in Nova Scotia, and dated 8th January, 1907, consigning the goods to the defendants at Winnipeg, was mailed in due course to the defendants, and was received by them, and, apparently pursuant to this shipping bill, the goods were handed over by the railway company to the defendants, and it would seem that this shipping bill was received by the defendants some time prior to the arrival of the goods in Winnipeg—the actual dates being: goods shipped 8th January; arrived in Winnipeg 1st February; delivered into the defendants' warehouse 4th February. The dates, however, of the mailing and receipt of this bill of lading do not appear in the evidence.

This question of where the property passed appears not to have been discussed in the Court below, and was not disposed of by the trial Judge, as he does not touch upon it in his judgment.

Considering the language of the order "f. o. b. Winnipeg," and the direct allegation in the statement of claim that the goods were to be delivered at Winnipeg, I think I must consider that a part of the bargain was that the plaintiffs should deliver those goods to the defendants in Winnipeg, and that therefore property did not pass until that delivery.

At this stage it seems well to consider the findings of the trial Judge. He gave a written judgment, and it being brief, it is well to repeat it at this stage:—

"In this case I find on the evidence that the sale of the second car of fish was a sale by sample. It would not be in accordance with the facts or common sense to find otherwise.

"I find, also, that the second car did not comply with the contract of sale, and did not correspond with sample when delivered either at Canso or at Winnipeg. This is, in my judgment, an unavoidable conclusion from the evidence. I hold that there was an express agreement between the parties, fully reserving the defendants' rights as to the first car. The plaintiffs' action should be dismissed. The defendants are entitled to judgment on their counterclaim. It is referred to the Master to ascertain their damages in respect of the second car, and the allowance to which they are entitled in regard to the first car. The defendants are to have their costs of this action."

The sale being by sample as found by the trial Judge, and the delivery being at Winnipeg, that is the place where the inspection should be, and let us assume that the purchasers were not to inspect until they took the goods off the cars and moved them to their warehouse. The property, upon such removal, passed to the defendants, subject to their right to reject the goods and revest the property in the plaintiffs, if upon inspection they are found not to comply with the contract.

The learned Judge has not made any finding on this branch of the case, and it is therefore necessary to examine the evidence and ascertain whether the defendants have properly exercised their right of rejecting the goods, and thus preventing property finally passing to them.

Upon this branch of the case the only evidence is that of the defendants and their employees. These acts took place in the absence of the vendors, very far from their place of business, and Connor, the agent of the plaintiffs, was, to the knowledge of the defendants' manager, somewhere in the neighbourhood of the Rocky Mountains at that time.

In handling goods of the precarious nature of those in question in this suit, far from the place where they were shipped and where the plaintiffs carry on their business, one would expect to find care and promptness on the part of the purchasers, so that, if they found the goods unequal to sample, any loss which the plaintiffs might sustain would be minimized by notification early that the property was rejected.

The defendants had been corresponding with the head office of the plaintiffs before these goods arrived here, respecting both car-loads, and they, of course, well knew the

plaintiffs' address. With these facts and principles before us, it would be well now to examine the various transactions of the defendants as to inspection and rejection.

Apparently the terms of payment were at 30 days, but from what date does not seem to be settled. The defendants claim from delivery. Apparently the plaintiffs drew on the defendants for the two car-loads by two separate drafts which arrived here and were presented to the defendants after the arrival of the first car-load but before the arrival of the second. The defendants refused to accept either of these drafts, and wrote on 30th January, 1907, the following letter:—

"Winnipeg, Man., Jan. 30, 1907.

"Messrs. Whitman Fish Co., Canso, N.S.

"Gentlemen:—Your two drafts were presented to us today for acceptance. We have refused to accept same, awaiting the arrival of the second car to see the condition in which the goods will turn out.

"We are very much dissatisfied with the success we have had in handling your goods.

"Yours truly,

"Winnipeg Fish Co.

"H. Wall, Mgr."

It is, therefore, apparent that before the arrival of the second car the defendants were doubtful as to its quality and were on their guard. The second car arrived in Winnipeg on 1st February, of which the defendants immediately received notice, and on 4th February the Winnipeg Cartage Co. delivered the car-load to the defendants, pursuant to a standing arrangement which they had with the company by which goods addressed to them should be delivered by the company in due course. The defendants received the fish in their warehouse, and piled them in a shed adjoining their freezer, on 4th February. The defendants' manager swears that some time before 9th February 10 boxes of these fish were sent to a retail shop in Winnipeg which is owned and operated by the defendants. These fish were at once offered for sale; several boxes were opened; and the evidence of the defendants' manager at the retail shop is clear that the fish were unfit for use and were returned to the wholesale warehouse. The defendants, therefore, knew not later than 9th February that these cases of fish were not merchantable, and

the manager knew that they were not up to sample. Various other dealings were had with these fish in the meantime, and correspondence was had between the defendants and the head office in Nova Scotia of the plaintiffs which require consideration.

In a letter dated 14th February from defendants to the plaintiffs, the former, amongst other things, state: 'We sold a quantity from the first car received from you by us to one of our customers, and they returned 49 boxes from this order, which we charged back to you. The balance of these two cars is in storage in our freezer at present, and we are very much afraid that we will have considerable difficulty in disposing of the goods at any price. One thing we are positive of, that the goods would never stand to carry during the summer season."

On 12th February the defendants wrote the following letter to Connor, the plaintiffs' agent, addressed to Calgary: "We have your letter of the 9th inst. asking us to pay freight on cars and draw on the Whitman Co. of Canso. We may say that we are having a lot of trouble with the haddie, and when we offer it for sale it is returned to us on account of the dealers feeling that something is wrong with the 'Aberdeen Awa' brand, and it seems impossible to get this out of their heads. It is really too bad that the trouble occurred on that first car, as it has practically killed the trade as far as your goods are concerned."

"That first car" referred to in the latter part of the letter relates to a car-load of fish shipped by the plaintiffs to the city of Winnipeg and distributed amongst several dealers, and does not refer to either of the cars shipped to the defendants, the subject matter of this suit.

The following 3 letters were written by the defendants on their respective dates:—

"Feby. 21st, '7.

"Messrs. The Whitman Fish Co., Canso, N.S.

"Gentlemen,—Enclosed find letter received from R. A. Rogers & Co. regarding the quality of the haddie sold them. We delivered them 200 boxes out of the first car received from you, and up to the present they have returned to us 49 boxes, and from their letter they intend returning more. As there is a possibility of both cars of haddie turning out very inferior stock, we must ask you to kindly take the last car

off our hands, as we will not accept same. The haddie business in this country for this season has been practically killed through the shipping of your goods. Kindly give disposition of this car, as we are cramped for room in our building."

"Feb. 23rd, 1907.

"Messrs. The Whitman Fish Co., Canso, N.S.

"Gentlemen,—We enclose herewith letters received from R. A. Rogers Co. Ltd. regarding a quantity of haddie sold them out of the first car received from you. We would ask you to kindly let us know your intentions in this matter. We will not, under any circumstances, endeavour to sell any 'Aberdeen Awa' haddie, as it is only spoiling the trade and is a means of loss to ourselves. We would ask you to kindly take the matter of this haddie proposition up with your agent here at once, in order that same may be taken off our hands, as we will not, as we have already said, endeavour to dispose of the goods."

"May 19, '07.

"Mr. H. G. Connor, Weldon Block, City.

"Dear Sir,—With reference to I. C. R. car No. 1984, haddies shipped to us by your company, we have given this shipment a fair inspection and trial, and the result has been to prove without doubt the uniformly bad condition of the fish.

"We hold them at your disposal. There is now on hand in our freezer of the first car, 698 boxes that are rejected by us, and we must require you to remove them at once. Storage will be charged against you in respect of them. We will also make up claim against you in respect of similar defects in the first car. Please arrange for the removal of those above referred to immediately."

Car No. 1984 is the second car. The 698 boxes should have been stated to be of the second car, and the letter should be so read.

As above mentioned, the defendants had sent to their retail store 10 boxes of finnan haddie, and their subsequent dealings with these goods is shewn by the evidence of the defendants' manager:—

"Q. What did you do with them?

"A. We did nothing further from that time until the 25th February, when I thought possibly we did not give them

as fair a test as necessary, and we sent a number of boxes out to country customers of ours to get their opinion."

The evidence shews that, when the second car-load arrived, it was placed in a shed adjoining the defendants' freezer, where the unsold portion of the first car was stored. On 5th March Connor, the plaintiffs' agent, returned to Winnipeg, and many complaints were made by the defendants respecting the quality of both car-loads of fish, and several inspections of these fish were made by persons called in by Mr. Connor. The defendants had not accepted either draft for either car-load, and Connor, after many interviews with them and after allowing them for 49 boxes which the defendants asserted had been returned to them out of sales which had already been made from the first car-load, induced the defendants to accept a draft for that car-load, thereby settling for the price thereof. All of which took place on 11th March.

The learned Judge has found that when the first car-load was settled for, as above mentioned, it was agreed that the defendants should make an allowance for any of the unsold portion of the first car (about 300 boxes) which might thereafter be found not up to contract, and there was evidence justifying this finding.

Other inspections were made of the remainder of the finnan haddie from time to time thereafter, and on 18th March the fish were removed into the defendants' freezer, an act necessary on account of the weather, to preserve them. Subsequently, and in the month of April, they were moved out of the freezer again into the shed, and, after being there for some time, the health officer of the city of Winnipeg inspected them and condemned them, and they were taken out to the crematory and burned. The amount thus taken to the crematory and destroyed was 840 boxes, the remains of the two car-loads.

Connor swears that he never heard any complaints or anything about any rejection of the second car-load until after he came to Winnipeg on 5th March, and there is no pretence that there is any rejection other than an alleged rejection to Connor some time in the middle or after the middle of March, and that shewn by the letters.

It will now be necessary to consider whether upon these facts the defendants, after having taken the goods in their possession, rejected them within a reasonable time so as to

revest the property in the plaintiffs. The learned trial Judge has not considered this branch of the case.

According to the evidence the defendants knew on 9th February that the fish were not up to sample, but, instead of promptly rejecting them and instead of a thorough inspection easily made, they write the various letters in which the only complaints are that the brand "Aberdeen Awa" is not good; perhaps it does not suit the fastidious tastes of the prairie people. There is no pretence of an inspection and a rejection because of the second car-load not being up to sample, and no formal rejection takes place until 18th March. Even after writing the letters of 21st and 23rd February, saying that they will not sell the goods, the defendants proceed to dispose of many boxes, and they in fact did sell out of the second car-load altogether about 150 boxes, many of which they say were subsequently returned. The defendants did not pretend that they inspected the goods themselves, but sold and delivered to the trade many boxes, and relied upon complaints for their knowledge of the quality.

The law on this question was fully discussed in Couston v. Chapman, L. R. 2 S. & D. 250, and although a case involving the law of Scotland, the English law is discussed. Lord Chelmsford at p. 254 says: "If he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial." Again, "Now was there delay in ascertaining the defective quality of the wine? It appears that at least the muddy unpleasant taste of the wine might have been discovered in the course of a week, perhaps, at the most." Lord Colonsay holds that there must be clear and distinct rejection of the goods in unambiguous language. "They did not state that they (the goods) were at the risk of the seller; in short, they did not fulfil that which for such a purpose is incumbent upon the purchaser." Lord Chelmsford says that the purchaser must state "that the goods are at his (the vendor's) risk; that they no longer belong to the purchaser; that the purchaser rejects them . . . and that the contract is rescinded." Lord Chelmsford in this case also held that the purchaser must either return them or place them in a neutral custody.

But this subject came up again in Grimolby v. Wells, L. R. 10 C. P. 393, and the Lord Chancellor refused to

follow this latter dictum, but in all other respects followed this law, and on p. 393 states: "A person who seeks to reject goods as not in accordance with contract must do nothing, after he discovers that they are so, in the nature of an exercise of dominion over the goods inconsistent with the property in them being in the vendor." And in that case both Brett and Denman, JJ., hold that if the goods remain on the premises of the purchaser, he should state or shew that the goods are not accepted and that they are at the risk of the vendor.

When the Sales of Goods Act was drafted, the principle of the latter case as to the non-return of the goods was adopted by sec. 36, which provides that "he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them." The latter part of sec. 35 provides that the buyer is presumed to have accepted if "he retains the goods without intimating to the seller that he has rejected them." One section requires an intimation that he refuses to accept them and the other that "he has rejected them."

In view of the decisions before the Act and the, to some extent, conflicting provisions of these two sections, it seems to me that where the purchaser has the custody of the goods, and property may or may not remain in him at his option, he must in clear and unequivocal language express his decision, and the intimation of non-acceptance or rejection must set forth a full and final decision to revest the property in the seller.

I therefore think that at all events there was no such decision until the letter of 18th March.

There seems to be no question that the fish could be readily inspected by opening a few boxes and taking a few fish out of each box and thawing them, and their condition would be readily apparent to any one. If not up to sample, the defects would be thus made apparent. There were no hidden defects, and if the defects as alleged by the defendants existed when the fish arrived here (and they were on the alert then as to the quality), a very few days would have sufficed for inspection and rejection.

I think the defendants retained the goods after the lapse of a reasonable time without rejecting them, and I further think that, after they were aware of the existence of the as-

serted defects, they did acts in relation to the goods which were inconsistent with the ownership of the seller.

Having arrived at this conclusion, the case must be considered as an action brought for the price of goods shipped at Canso, delivered to the defendants at Winnipeg and accepted by them, and, as the goods were accepted by the defendants and became their property, the plaintiffs are entitled to a verdict for the purchase price, subject to the defendants' right under sec. 52 (sec. 53 of the English Act) of diminishing or extinguishing this sum because of breach of warranty, or to ulterior damages by counterclaim.

This view of the case was not taken by the trial Judge. He dismissed the plaintiffs' claim with costs, and referred the question of the defendants' damages to the Master.

The plaintiffs being entitled to a verdict for the price of the second car-load, it is necessary to look into the evidence to find what the defendants are entitled to by way of damages for breach of warranty, not only as to the second car-load, but also the balance of the first car-load, to the extent of the portion thereof remaining unsold when the settlement was made on 11th March.

I think the facts in this case bring it within sec. 33 of the Act, and that therefore the defendants take the risk of deterioration necessarily incident to the transit from Canso to Winnipeg, although the plaintiffs must deliver in Winnipeg, and property does not pass until that destination is reached, and I have no doubt that both parties understood that the goods were to come, as they did come, by ordinary course of freight.

The plaintiffs must be at the risk of all damages and dangers not covered by the risk of the defendants above mentioned.

The evidence as to the quality and condition of the fish when delivered to the railway company at Canso was taken by commission in Nova Scotia and read at the trial, and there was no other or conflicting evidence except inferences hereinafter referred to. This evidence shews that the fish at that time and in that place was in good condition and apparently fit for the journey, yet the learned Judge finds the fish did not comply with the contract when delivered at Canso. There was no evidence given by either side as to the treatment of the car-load for the 22 days between delivery to the carrier and its arrival here, nor is there any evidence

concerning the same during the 4 days it was here before reaching the defendants' warehouse.

It was sought by evidence to prove that because certain fresh water fish from our lakes here require certain periods for salting, smoking, and cooling, done in the summer, therefore the fish in question cured at the seaside in December must have been improperly treated. I think such evidence is inapplicable. Even if we believe the defendants' testimony that 10 boxes were discovered bad about 9th February, and that the whole mass was not up to contract in March, I cannot see how the learned Judge should thereby conclude that the evidence taken in Nova Scotia was untrue. He did not see the demeanour of these witnesses, and this Court is in as good a position to weigh that evidence as the trial Judge. I cannot agree with the trial Judge on that finding of fact, and I conclude from the evidence that the fish were of good quality and condition when delivered to the carrier at Canso.

It would be well at this stage to consider the defendants' claim for damages for the first car-load, because their treatment of that shipment throws light upon their treatment of the second car-load.

Wall, the defendants' manager, in his evidence swears that when he settled for the first car-load it was agreed that the plaintiffs would make good any future loss, and this is his evidence:—

"Q. He agreed to that?

"A. Yes, the cheque was not in full settlement of the account at all, because we had at that time about 300 boxes of the first car still on hand.

"Q. Do you know whether any of these haddies out of the first car were shipped out to customers after 11th March?

"A. None.

"Q. What became of them?

"A. They were seized by the health authorities and taken to the crematory."

Prior to 11th March (the date of settling for the first car) the plaintiffs had sold about 500 boxes, and, as before mentioned, only 49 boxes had been objected to, and Connor took those and gave credit for them, and of these 49 boxes he sold all but 17. But, assuming that the whole 49 were useless, less than 9 per cent. of the first 500 were bad, and yet Wall swears that the whole remaining 300 were utterly unfit for human food. Either this evidence is untrue, or the

defendants' treatment of the fish caused them to spoil. The 300 boxes were in the same shed as the second car-load, and all were treated alike.

The evidence is clear that if the fish were allowed to thaw they would rapidly deteriorate. Did they thaw on the way here from Canso or here while on the cars or after delivery to the defendants?

The defendants having accepted the fish, the onus is upon them to prove such facts as would establish their defence and counterclaim.

The fish were from 4th February to 18th March in a shed kept frozen, the defendants allege, by the winter cold. On the latter date they were put in a freezer, and in April they were again put in the shed, where, if not already spoiled, they would soon become unfit for human food, and were necessarily then taken to the nuisance ground.

I have dealt with the condition of the fish when delivered to the carrier at Canso. The learned Judge has found that on arrival at Winnipeg they "did not comply with the contract of sale and did not correspond with sample." As above mentioned, the defendants' manager swore that 10 boxes were found to be bad on or before 9th February, yet the letters of 12th and 14th were written as above set out, without any mention of it, followed by those of 21st and 23rd February, and still no mention of it. If on arrival at Winnipeg the goods were in the state that they were described to be in the middle and latter part of March and in April, I cannot believe that the defendants would not have known it and have at once rejected the stuff as wholly unfit for human food.

The purchase was "Aberdeen Awa" haddie up to a certain sample. The whole refrain in the letters was that "Aberdeen Awa" was not saleable in this market, and that the defendants would not try to sell it, as it injured their trade. They had several car-loads of other haddies, and apparently pushed the sales of the latter. There were, according to the defendants' evidence, 300 boxes of the first car all sent to the crematory. Of the 800 boxes of the second car less than 150 were sold, and a large portion of this returned, and the returned ones with those not sold were all taken by the health authorities, yet the latter only got 840 boxes, and no account is pretended to be given of the difference.

I am compelled to come to a different conclusion on the evidence from that of the learned trial Judge. I think the

defendants have not shewn what the condition or character of the fish was when it reached Winnipeg. They have not shewn what caused the damages, or when or where the fish spoiled. It was easily within the powers of the defendants to shew the exact state of the goods on their arrival here, if they had done what they ought to have done at once, namely, examine and inspect the goods to see if they were up to sample. They did not choose to take that plan, but kept possession of these perishable goods until climatic conditions made the holding of them precarious, and if they now suffer loss it was largely caused by their own negligence.

The plaintiffs are entitled to a verdict for the purchase price of the second car-load, less the freight paid by the defendants, namely, $1,124.30. They are also entitled for mackerel sold and delivered, about which there is no dispute, to the sum of $269, making a total of $1,393.30.

The appeal is allowed with costs and the judgment entered must be set aside and a judgment entered for the plaintiffs for the sum of $1,393.30 with costs of suit.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

CAMPBELL v. IMPERIAL LOAN CO.

Mortgage—Sale by Mortgagees under Power — Action by Mortgagor to Redeem — Possession — Legal Estate — Notice of Sale—Limitation of Actions—Real Property Limitation Act.

Appeal by plaintiff from judgment of MATHERS, J., 6 W. L. R. 481, dismissing the action with costs.

The action was for the redemption of certain mortgaged lands, brought by Elizabeth Campbell against the Imperial Loan and Investment Company of Canada, the mortgagees, and D. S. McMurachy, John Morton, O. W. Hodgkinson, and F. W. Clausing, the last 4 defendants being persons who

claimed to have purchased the lands from the company under power of sale contained in the mortgage.

The statement of claim set out that one Daniel P. McLaurin, being the owner in fee simple of sections 17 and 31 and the north-west quarter of 33 in township 15, range 22, west of the principal meridian in Manitoba, borrowed from the Imperial Loan and Investment Company of Canada the sum of $1,250, on a mortgage of the lands. This mortgage was dated 26th February, 1890, and the money was advanced on the security of it. McLaurin on 22nd December, 1894, transferred his equity of redemption to the plaintiff. By a statute of Manitoba, 3 Edw. VII. ch. 56, the Imperial Loan and Investment Company of Canada, the present defendants, took over all the assets, interests, rights, franchises, credits, effects, and property whatsoever of the Imperial Loan and Investment Company of Canada Limited, and all the property of the former company was transferred to the present defendants. The plaintiff alleged a tender of the moneys due under the mortgage and a refusal to accept. It was alleged that the company had pretended to have sold to their co-defendants McMurachy and Morton and Hodgkinson portions of the lands respectively, and that the defendant Clausing was a purchaser from Hodgkinson. Redemption of the land was claimed.

The defendant company claimed to have sold the lands under the power given by the mortgage. The mortgages contained a power of sale enabling the mortgagees to sell without notice where default existed for the space of 1 month and 10 days. It shewed a long continued default under the mortgage, and that sales were effected in pursuance of such power, under which sales the defendants claimed the property.

The defendants other than the company set up the purchase by them from the company bona fide and for value. They also set up laches, acquiescence, and estoppel as against the plaintiff.

The defence of the Statute of Limitations was also set up as against the plaintiff. A further defence was added at the trial to the effect that the purchasers were entitled to the benefit of a purchaser's protective clause contained therein, absolving the purchaser from inquiring as to the legality or propriety of the sale.

The appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. J. Andrews and H. A. Burbidge, for plaintiff.

J. A. M. Aikins, K.C., A. Haggart, K.C., E. L. Taylor, and J. F. Kilgour, for the several defendants.

PERDUE, J.A.:—The action was tried by Mathers, J., and dismissed by him solely upon the ground of the Statute of Limitations, following Rutherford v. Mitchell, 15 Man. R. 390, the action not having been commenced for over 10 years after the mortgage became in default. From that judgment the present appeal is brought.

The mortgage in question is for $1,250, dated 26th February, 1890. The principal is repayable in 3 equal consecutive annual payments, the first to become due on 1st January, 1891, and interest is to be paid on the principal at the rate of 8 per cent. per annum yearly on 1st January.

The mortgage contained the following provisions respecting powers of sale: "Provided that the said mortgagees, on default of payment for one month, may, on giving one week's notice, enter on and lease or sell the said lands, and that such notice may be effectually given either by leaving the same on the mortgaged premises or on some portion thereof, or, at the option of the mortgagees, by publishing the same once in some newspaper published in the city or county where the land is situated. . . .

"Provided always that in default of payment for one month and 10 days, the said mortgagees may, without any notice whatever, enter upon the said land and proceed under and exercise the power of sale or lease hereinafter conferred."

A payment of $84.80 was made on account of interest in September, 1891, but no further or other payment by the mortgagor, or any person claiming through him, was made either upon the mortgage or for taxes. It is undisputed that the mortgage became in arrear on 1st January, 1892, if not earlier.

On 22nd December, 1894, McLaurin by a quit claim deed conveyed the lands to the plaintiff.

The north-west quarter of section 33 was sold for taxes and not redeemed, and no claim is made in respect of that parcel of land. The company paid the taxes on the other portions of the mortgaged lands.

On 12th November, 1896, the company by their agent, Mr. Kirchoffer, agreed to sell the west half of section 17 to Robert Michael and David H. Watson, and on 5th March, 1897, a similar agreement was made as to the east half of the same section with David H. Watson. These agreements were not carried out, and on 22nd December, 1899, an agreement was made for the sale of the whole of section 17 to the defendant Morton.

On 1st June, 1901, the company made an agreement for sale of the south half of section 31 to the defendant McMurachy, and on 5th January, 1903, the company sold the north half of section 31 to the defendant Hodgkinson, who on 19th January of the same year assigned his agreement to the defendant Clausing.

The plaintiff's husband, James Campbell, acted for her as her agent not only in acquiring the land but in the subsequent conduct of the matters connected with it. McLaurin conveyed the land to the plaintiff by a quit claim deed dated 22nd December, 1894, the consideration mentioned in it being one dollar, but it contained a covenant by the grantee to indemnify the grantor against liability on the existing mortgage.

At the time the plaintiff obtained this quit claim deed, she was, through her husband, well aware that the mortgage was in arrear. At that time the whole mortgage money was due. For several years after receiving the quit claim deed she made no payment or tender of any money on account of principal, interest, or taxes. Her husband states that he wrote repeatedly to Mr. Kirchoffer, the company's agent at Brandon, for a statement of the amount due, but received no reply. On 16th July, 1898, Kirchoffer wrote to him informing him that section 17 had been sold by the mortgagees, and he suggested that Campbell should, in his own interest, assist in disposing of the remainder of the land. On 4th April, 1899, another letter was written by Kirchoffer to Campbell, in which he repeated the information that section 17 had been sold to Watson and Michael for $1,280. He said that after crediting that amount on the mortgagees' claim there would still be a balance of $1,560 due, and again suggested that Campbell should act jointly with them for their mutual advantage. The plaintiff made no objection to these sales, and no attempt was shown to have been made by her to redeem the rest of the land. She paid nothing to the mortgagees and paid none of the taxes,

The land was sold for taxes, and was, with the exception of the north-west quarter of 33, redeemed by the company. The quarter section, not having been redeemed, was lost. The plaintiff made no effort to preserve it.

After the letter of 4th April, 1899, was received, Campbell had an interview with Kirchoffer, but nothing appears to have resulted from it. Campbell, however, states that he knew Kirchoffer was trying to sell the remainder of the lands. He says that after he got the second letter he read over the mortgage and came to the conclusion that the mortgagees had power to sell without notice, and there was no use in his doing anything. He and the plaintiff appear to have rested content with this view until just before the commencement of this suit, in October, 1903, when he consulted a solicitor. In the meantime Watson and Michael had sold their interests in the land to the defendant Morton, who had obtained a new agreement from the company covering section 17 (the agreements with Watson and Michael being surrendered), and section 31 had been sold to the defendants McMurachy and Hodgkinson.

The reason given by Campbell for making no payment on account of interest was, as stated by him in his evidence in these words: "It wasn't very likely I was going to pay 8 per cent. when I was making 50 per cent. . . . It was cheaper for me to let it run."

In 1904, and for several years thereafter, the land was low in value, and being vacant and unimproved it was difficult to sell it. Subsequently the land increased in value, but no attempt is made to impeach the sales as having been made at too low a price. It is evident from the conduct of the plaintiff and the admissions made by her husband, that their intention was to allow the mortgage to run, making no attempt to pay interest or taxes; then if the land increased in value they would redeem it if it suited them; if not, they would let it go.

Much of the argument was devoted to the question as to whether the plaintiff's claim for relief was barred by the Statute of Limitations. The case of Rutherford v. Mitchell, 15 Man. L. R. 390, is directly in point. It was followed by the trial Judge, he being of opinion that he was bound by that decision, although he does not expressly approve of it.

Section 20 of the Real Property Limitation Act, R. S. M. 1902 ch. 100, enacts that when a mortgagee has obtained possession, or receipt of the profits, of any land, the

mortgagor or any person claiming through him shall not bring any action or suit to redeem the mortgage but within 10 years next after the time at which the mortgagee obtained such possession or receipt, unless an acknowledgment in writing has been given by the mortgagee. Under this, one of two things is necessary, either that the mortgagee has obtained possession of the land, or that he has obtained receipt of the profits of the land. The land in this instance being vacant and uncultivated up to the time of sale, there were no profits receivable, and therefore the second of the two conditions above mentioned does not apply. There remains the question of the possession by the mortgagees. Mr. Aikins, for defendants, contended that the mortgage was a conveyance of the land to the mortgagee, subject only to the right of redemption, that the mortgagor was only entitled to possession until default should be made, and that upon default the mortgagee might at once eject the mortgagor and take possession of the land. In this case there was no one in visible possession, the land being vacant. There was, therefore, no necessity for bringing ejectment, or taking other steps to obtain possession, there being no one against whom such a proceeding could be brought. It was argued, therefore, that, as the law presumes possession to go with the legal estate in case of vacant lands, possession of the lands in question must be deemed to have been in the mortgagees since default was made. In support of this contention the following authorities were cited: Agency Co. v. Short, 13 App. Cas. 798; Delaney v. Canadian Pacific R. W. Co., 21 O. R. 11; Wood on Limitations, p. 606; Armour on Real Property, p. 183.

If, under the above contention, a mortgagee is deemed to be in possession of vacant lands after default has been made by the mortgagor, such a possession is merely a constructive one, and the question at once arises, is that such a possession as is contemplated by the statute?

In Smith v. Lloyd, 9 Ex. 562, Parke, B., giving the judgment of the Court, declared that the statute applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time; that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the statute. This interpretation is approved in Agency Co. v. Short, 13 App. Cas. 798. The principle laid down in Smith v. Lloyd

seems to have been intended to apply generally to the statute: Darby & Bosanquet on Statute of Limitations, p. 310. In McConaghy v. Denmark, 4 S. C. R. 632, Gwynne, J., in giving the judgment of the majority of the Court, held that the possession which is contemplated by the statute is an actual, constant, visible one. I can see no reason for drawing a distinction between the possession which must be shewn by a mortgagee under sec. 20 of the Act in order to bar the owner of the equity of redemption, and the possession which must be shewn under other sections of the Act. If the land is vacant, uncultivated, and wild, as the land in question was shewn to be, no one is in possession of it, and if the mortgagee, upon default in payment taking place, actually makes an entry on the land, he is not merely by reason of that entry to be deemed in possession of it: sec. 10.

An action for redemption is a suit for the recovery of land: Faulds v. Harper, 11 S. C. R. 655; Heath v. Pugh, 7 App. Cas. 235. Under the King's Bench Act, sec. 38, sub-secs. (a) and (g), equitable rights are to be recognized and dealt with as would be done by a court of equity before the passing of the Act. In equity the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage is regarded as a mere security: Heath v. Pugh, 6 Q. B. D. 345. In view of this, it appears to me that there must be actual possession in the mortgagee, or receipt of the profits for the period prescribed by the statute, before sec. 20 will apply so as to bar the mortgagor of the estate he has in the land. The judgment in Rutherford v. Mitchell was delivered at the trial of the action. My brother Richards, who gave the decision, and for whose opinion I have the greatest respect, had not the advantage which this Court has had of hearing the fullest possible arguments on both sides, and of perusing the very able opinions on the subject by eminent counsel of the Ontario bar.

Before passing from this branch I would say that I do not think that sec. 29 affects this point, as was argued at bar. That section is as follows: "No person claiming land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same.

respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he claims therein in equity."

This provision corresponds to sec. 24 of the Imperial Act 3 & 4 Wm. IV. ch. 27. The effect of the section is, so far as the limitation of time is concerned, to place (subject to the exceptions contained in the sections following) every remedy in equity for the recovery of land or rent in the same position as if it were a remedy at law: Darby & Bosanquet on Statute of Limitations, p. 414; Archbold v. Scully, 9 H. L. Cas. 379.

"The statute was intended to put an end altogether to the discretion of courts of equity in those cases where they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court; but is incorporated in the statute:" per Lord Lyndhurst in Berrington v. Evans, 1 Y. & C. 439. If the plaintiff's claim to the land were a purely legal one, it would not, on the facts, be barred under the statute; she is therefore in time in bringing her equitable claim. Section 20 deals specifically with actions of redemption and declares what shall operate as a bar in such actions. It was intended to bind and does bind the courts of law and the courts of equity.

The next question to be dealt with is that relating to laches, acquiescence, and estoppel. Where a person is entitled to land, the general rule is that mere acquiescence or laches in asserting his rights will not, unless the Statute of Limitations applies and imposes a bar, deprive him of his estate: Rochdale Co. v. King, 2 Sim. N. S. 87; Archbold v. Scully, 9 H. L. Cas. 388; In re Maddever, 27 Ch. D. 523. But, if any new rights have been created in the interval, or if any one is prejudiced by the delay, laches or acquiescence may constitute a bar; Archbold v. Scully, supra, pp. 371, 388. The Real Property Limitation Act by sec. 33 specially reserves the jurisdiction of courts of equity to refuse relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit is not barred by virtue of the Act.

In the present case the plaintiff took no steps to pay interest or taxes, and for some 4 years does not appear to have even communicated with the mortgagee. In 1898 she learned of the sales to Watson and Michael, which were

shortly afterwards transferred to the defendant Morton, but she raised no objection. Her husband states that he read the mortgage and came to the conclusion that the mortgagees had power to sell without notice, and that there was no use in his doing anything. The plaintiff also knew that the mortgagees were trying to sell the remainder of the land. They even invited her co-operation so as to get as good a sale as possible. Then, in June, 1901, another half section of the land is sold to McMurachy. Still there is no objection, no protest against these sales on the part of the plaintiff. The purchasers in the meantime take possession of the land, make valuable improvements, and pay the purchase money. It is not until October, 1903, that the plaintiff wakes up to the rights she here asserts, claims the right of redemption, and enters suit. Such delay on her part is not mere laches, it is acquiescence: per Lord Wensleydale in Archbold v. Scully, supra, p. 383. See also Pickering v. Stamford, 2 Ves. 280; Blake v. Gale, 31 Ch. D. 196.

In Nutt v. Easton, [1899] 1 Ch. 873, affirmed in appeal, [1900] 1 Ch. 29, the executrix of the mortgagee of a reversionary interest employed a solicitor to obtain probate of the mortgagee's will. The executrix, in the exercise of the power of sale in the mortgage, sold the reversion to the solicitor. The owner of the equity of redemption received notice, but took no steps to set aside the transaction until 10 years afterwards, when the reversion fell into possession. It was held that the solicitor was not acting for the mortgagee at the time of the sale, but that, even if he had been so acting, the owner of the equity of redemption was barred by his laches and acquiescence. I see no real difference between a lapse of 10 years and one of 5 years so far as the equitable doctrine of laches and acquiescence is concerned, especially if the interests of innocent third parties have come into question in connection with the shorter period. See also Cairncross v. Lorimer, 3 Macq. 827; Ferrand v. Clay, 1 Jur. 165.

The main objection to the validity of the sales was, as it was contended, that there was no power to sell without notice. The clause purporting to give this power provides "that in default of the payment for one month and 10 days, the said mortgagees may without any notice whatever enter upon the said land and proceed under and exercise the power of sale or lease hereinafter conferred." There was no power of sale thereinafter conferred, but the statu-

tory power of sale under the Short Forms Act was contained in an earlier portion of the mortgage. The word "hereinafter" is a misprint or clerical error for "herein" or "hereinbefore." If we cannot find the power referred to in the subsequent portion of the mortgage, we must look for it elsewhere, and if we find a power in the earlier portion we must take it that the reference was made to the power so found. The Court will correct such an obvious mistake: Wilson v. Wilson, 5 H. L. Cas. 66. In Bengough v. Edridge, 1 Sim. 269, the word "hereinbefore" was substituted for the word "hereinafter" in construing a will, the purpose of the testator being manifest. See also Hanbury v. Tyrell, 21 Beav. 322; Burchell v. Clark, 2 C. P. D. 93; Norton on Deeds, p. 82.

I see no difficulty in construing the meaning of the clause giving power to sell without notice if it is read in connection with the statutory power. The intention of the instrument will then clearly appear to be that in case default is made for the time mentioned in the statutory power, then that power may be executed by giving notice in the manner prescribed by it; but if default is made for the longer period referred to in the clause in question, then the sale may be made without giving any notice. It means that the mortgagor has given a second power of sale, operative in a certain event, which power may be exercised without notice, the sale to be made in other respects as set out in the long form relating to power of sale embodied in the mortgage by operation of the statute. In British Canadian Investment Co. v. Ray, 16 O. R. 15, Street, J., held that a power of sale which dispensed with notice was good. In that case there did not appear to have been a second power given, additional to the statutory one, as in the present case. We are not, therefore, troubled in considering whether the variation in the power renders the Act inapplicable, a question which seems to have been left open in British Canadian Investment Co. v. Ray. The Act is clearly applicable in the present case.

The mortgage contained a clause declaring that "no purchaser under said power shall be bound to inquire into the legality or regularity of any sale under the said power or to see to the application of the purchase money." A provision similar to the above was considered by Jessel, M.R., in Dicker v. Angerstein, 3 Ch. D. 600. He held that such a clause operated as a protection to a bona fide purchaser

without notice, even if the security had been satisfied, that the object of the transaction is that the purchaser is to be safe, if a bona fide one, without making any inquiry. This case was distinguished in Life Insurance Corporation v. Hand in Hand Society, [1898] 2 Ch. 231. In the latter case protection was given by the similar clause in the English Conveyancing Act, but that clause applied only where a conveyance had been given, and it was therefore held not to be applicable to the case of a mere contract for sale. Dicker v. Angerstein is, however, applicable to the present case. If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of damages against him: Hoole v. Smith, 17 Ch. D. 434. The object of the clause in question is to do away with the necessity, on the part of the purchaser, of looking into the regularity or legality of the sale proceedings, and, if a sale is made, to make it binding on the mortgagor and leave him to his action of damages against the mortgagee.

The mortgage was made to the Imperial Loan and Investment Company of Canada Limited, and, as is alleged in the statement of claim, by Manitoba statute 3 Edw. VII. ch. 56, the property, franchises, goodwill, liabilities, debts, and duties of that company were transferred to the defendants the Imperial Loan and Investment Company of Canada, who thereupon became the mortgagees of the said lands. The new company were incorporated by 62 & 63 Vict. ch. 116 (D.), and were simply a re-incorporation by statute of the old company which had been formed under letters patent under the great seal of the Dominion of Canada. The shareholders of the old company became shareholders in the new, and provision was made for the transfer of the assets of the old to the new company. That transfer was made. Several objections were taken on the argument to the validity of the sales in question by reason of this change, and to the manner in which the agreements were executed. I do not think that any of the objections taken were valid. The new company plainly took the place of the old, and anything done by the old company enured to the benefit of the new, and might be lawfully carried out and completed by them, or the new company might themselves institute and complete any proceedings necessary to be taken under the mortgages.

The sales made were adopted by the defendant company, and the moneys payable thereunder were received by them. This disposes of the question as to the authority of the local agent to sell.

Another objection was that simply a contract to sell was entered into, and that no conveyance under the power of sale had been made. It is well known that the vast majority of sales by mortgage companies under power of sale in their mortgages are carried out in this way. It seems to me unimportant whether a conveyance is given by the mortgagee to the purchaser, and a mortgage taken back to secure the deferred payments, or simply a contract is entered into between the parties which effects a sale and provides for the payment of the purchase money on the terms agreed upon. The main consideration is, has a binding sale been made? No question can be raised as to the validity of the contracts. The purchasers were let into possession, continued in possession, and have paid the purchase money. Upon the contract being executed, the purchaser became the equitable owner, a status to which this Court must give the fullest effect. That a mortgagee may validly exercise the power of sale by receiving only part of the purchase money and taking a mortgage on the property for the balance, has been held in Thurlow v. Mackeson, L. R. 4 Q. B. 97.

Having come to the conclusions above set forth, I do not think it necessary to discuss the effect of 5 & 6 Edw. VII. ch. 50 (Man.), as amended by 6 & 7 Edw. VII. ch. 26 (Man.)

A further point was taken by the plaintiff that in September, 1903, a notice of sale was posted up on the land at the instance of the company's solicitors. It was contended that this gave the right to redeem. I cannot think that it had that effect. It was not the act of the purchasers, and their rights could not be prejudiced by it.

I think the appeal should be dismissed with costs.

PHIPPEN, J.A.:—Mr. Andrews argued very strongly that this Court was precluded, on the defence of the Statute of Limitations, by the decision of the Supreme Court of Canada in Faulds v. Harper, 11 S. C. R. 639. At first I was of the same opinion, but, on more careful consideration, the Faulds case does not appear to be an authority on the

present issue. In that action the plaintiffs claimed as heirs at law of a mortgagor who became such by mortgage dated 20th April, 1857, and who died on 1st July in the following year. The mortgage became in default, whereupon the mortgagee brought an action for foreclosure or sale against the plaintiffs in the Faulds suit, they being then infants, and a decree was made under which the property was sold on 12th April, 1862. The property was purchased by a nominee of the mortgagee, who straightway re-conveyed the estate to the mortgagee under circumstances upon which the Court subsequently held that the mortgage was not foreclosed, but that the mortgagee held the estate as trustee for the heirs of the mortgagor, subject to payment of the mortgage debt. Upon such sale the mortgagee leased the mortgaged premises, and until 29th December, 1879, by himself and his heirs remained in actual possession of the property or in actual receipt of its profits. On the last named date the property was sold by the heir at law of the mortgagee to a bona fide purchaser for value. Within 10 years thereafter the heirs at law of the mortgagor brought an action to redeem, to which the Statute of Limitations was pleaded as a defence. The section of the statute relied upon, 3 & 4 Wm. IV. ch. 27, sec. 28, afterwards R. S. O. ch. 108, sec. 19, is, for the purpose of present consideration, similar to sec. 20 of our Act, R. S. M. ch. 100. The Supreme Court of Canada held that the mortgagee and those claiming under him down to 1879 took and held possession in the character of owners, and not as mortgagees, wherefore the Act was not a defence.

Mr. Aikins argued that the property being vacant the mortgagee upon default is constructively in possession, and a lapse of 10 years under such conditions is a compliance with the statute which will bar the mortgagee's title. In Faulds v. Harper neither the mortgagor nor the mortgagee was in possession as such. The mortgaged premises were actually occupied by the mortgagee and his heirs for more than the statutory period, but in the fiduciary position of trustee for the mortgagor. The judgment of the Supreme Court, as I understand it, recognizing that possession of a trustee is not such as will support the statute, holds the mortgagor and his representatives not to be affected thereby. The actual possession being in a trustee, the Supreme Court refused to hold that such a possession inured for the benefit of the mortgagee so as to bar the title of the mortgagor.

Once it was determined that the possession was that of a trustee and not a mortgagee, I do not see how it would have been possible to come to the conclusion that the mortgagor had lost his title by reason of a statute dependent upon a possession which never existed, either in fact or by presumption of law.

Section 20 is in part as follows: "When a mortgagee has obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage, but within 10 years next after the time at which the mortgagee obtained such possession or receipt, unless," etc.

The natural reading of this section would seem to make it applicable to actual occupation only, and there would appear to be abundant authority to support this construction. In Agency Co. v. Short, 13 App. Cas. 793, the Judicial Committee of the Privy Council, construing a Statute of Limitations very similar to our own, quotes with approval the language of Parke, B., in Smith v. Lloyd, 9 Ex. 562, where, in giving the judgment of the Court, he said: "We are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in M'Donnell v. M'Kinty, 10 Ir. L. R. 514, and the principle upon which it is founded."

This view was applied to the Manitoba Act by Chief Justice Killam in Bucknam v. Stewart, 11 Man. L. R. 625.

The Statute of Limitations, on grounds of public policy, works a forfeiture. Its language should be explicit, and personally I have no hesitation in construing the possession referred to in sec. 20 as an actual visible possession, and the "receipt of profits" as a real receipt, rather than to deprive an owner of his estate by reason of a possession created entirely by fiction of law, a possession which might be naturally unsuspected by a mortgagor who knew as a fact that his property was and at all times had been, without any actual occupation whatever.

Without repeating the numerous authorities cited, I prefer to hold that there must be an actual possession before the statute commences to run under sec. 20 against a mortgagee who subsequently seeks redemption.

It was next argued by Mr. Aikins and with much ingenuity that, assuming the statute to refer only to actual possession, equity, following the law, should refuse relief where more than 10 years from default had elapsed. During the argument I endeavoured to ascertain, but without entire satisfaction to myself, just what law it was which Mr. Aikins contended equity should follow. Admitting that the section relates to actual possession or receipt (and it is only then the doctrine can be appealed to), the statute has dealt with the specific case. Section 20 provides that, when a mortgagor seeks to redeem, the statute may be successfully interposed as an answer if more than 10 years have elapsed since the mortgagee obtained actual possession of the property or receipt of the profits. Mr. Aikins's argument would have it declared, as an equitable doctrine, that the statutory period should be changed so as to run from default and not from possession, a variation and not a following of the law.

Has the plaintiff estopped himself from disputing the right of the company to sell, or has he stood by under circumstances which would make it inequitable to decree redemption except upon the terms of the mortgagor adopting or carrying out the mortgagee's contracts of sale? The facts on this point have been fully set out by my brother Perdue, and delivering a junior judgment, I adopt rather than repeat his statement. What is their legal effect?

Mr. Andrews argues that the mortgage contains no power of sale exercisable without notice; that the right of the mortgagees to sell, or rather their lack of such right, was apparent from an examination of their title, and was therefore a matter of common information to all concerned: that, as the vendors and purchasers each had the same knowledge and means of knowledge as the mortgagor, there was no duty cast on the plaintiff to warn the mortgagees against attempting to sell in an unauthorized manner, or the purchasers from buying at such a sale.

The mortgage, which is expressed to be made in pursuance of the Short Forms of Indentures Act, contains the following power of sale: "Provided that the said mortgagees, on default of payment for one month, may, on one

week's notice, enter on and lease or sell the said lands, and that such notice may be effectually given either by leaving the same on the mortgaged premises or on some portion thereof, or, at the option of the mortgagees, by publishing the same in some newspaper published in the city or county where the land is situated."

After the intervention of other matter comes the following additional provision: "Provided always that in default of payment for one month and 10 days the said mortgagees may, without any notice whatever, enter upon the said land and proceed under and exercise the power of sale or lease hereinafter conferred."

Then follows (to complete my extracts from the mortgage): "And provided that the mortgagees may vary or rescind any contract for sale made or entered into by virtue of such power and may buy in and re-sell the said land or any part thereof without being responsible for any loss or deficiency on any such resale, and that no purchaser under said power shall be bound to inquire into the legality or regularity of any sale under such power."

There is no "power of sale or lease hereinafter conferred." There are two conditions mentioned upon which the power of sale "hereby given" may be exercised. It is argued that "hereinafter" should be read as limiting the right to exercise the power without notice to a power "hereinafter conferred," and, no such power being found, that the mortgage confers no right to sell without notice.

The use of the word "hereinafter" was evidently by inadvertence, it being a misprint for "herein" or "hereinbefore." Apart from this, however, the mortgage contains a complete power of sale exercisable on 10 days' notice, with provisions for service which make it reasonably certain that the notice would never actually come to the attention of the mortgagor.

This is not the case of an attempted sale under a document containing no power. The power is ample, but under one set of circumstances before it is exercised the mortgagees are to leave a notice on some part of a vacant farm at least 10 days before selling. They attempt to sell without doing so. The mortgagor, with knowledge, stands by for years after one parcel of land is sold without objection while the property increases in value and the purchaser completes his improvements. As to the remaining parcel

he knows for years that the mortgagees are attempting to sell without formal notice, yet he again stands by without objection, without raising a warning hand, until the sale is completed, and the purchasers have improved their premises. Will he now be allowed to redeem, taking the property freed from the sale agreements? I think not.

Under the principle of Nutt v. Easton, [1899] 1 Ch. 873, affirmed in appeal in [1900] 1 Ch. 29, he must be held to have acquiesced in the sale under the power without the formality of a notice. The inequity of any other conclusion is apparent when we consider that, had the objection been taken with reasonable promptitude, the only result, so far as the mortgagor is concerned, would have been the receipt of the 10 days' notice of the mortgagees' intention to do that of which the mortgagor already had full written, although not formal, notice from the company, namely, of the mortgagees' intention to effect a sale for the purpose of paying the mortgage debt.

It is not contended that the mortgagees sold unfairly or at an undervalue. On the contrary, so far as the last parcel is concerned, the western manager of the company requested the plaintiff to join him in finding a satisfactory purchaser, and no sale was made for several years thereafter, during which time the plaintiff had full opportunity of making a sale or redeeming; yet he did neither, preferring to allow the mortgage company to bear the burden during the depressed times. Having stood by for nearly 15 years without making a payment either of principal, interest, or taxes, he will not, now that the property has passed into the hands of innocent purchasers, and increased in value, be allowed to redeem, disregarding the obligations of sale entered into by the mortgagees.

I cannot give effect to the argument that the power of sale in the mortgage under consideration cannot be exercised by other than a deed given in exchange for the cash purchase price. It is difficult to see how a sale could be negotiated without some obligation on the mortgagee before the execution of the deed and payment of the consideration, yet, on the plaintiff's argument, during this interim, whether short or long, the mortgagor would have the right to redeem, leaving the mortgagee to protect himself as best he might against outstanding covenants.

The Short Forms of Indentures Act recognizes the right of a mortgagee to sell on time. The mortgage in question

itself provides that in exercising the power of sale the mortgagees may vary or rescind any contract for sale made or entered into. This implies a power to the mortgagees to make an agreement of sale without the present receipt of the total purchase price.

I am not certain, however, that the execution of such an agreement puts an end to the right of the mortgagor to redeem. It may be that until the agreement has been fully carried out, the mortgagor, having regard to the receipt of any surplus purchase moneys over and above the amount necessary to discharge the mortgage obligation, and to the possibility of the property agreed to be sold reverting by reason of the failure of the purchaser to carry out his contract, has the right to a present redemption, taking the mortgaged property subject to the contracts of sale. This point, however, was not argued on the appeal, and, as the contract moneys are practically only equivalent to the mortgage debt, there would be no advantage to the mortgagor in granting him redemption subject to the outstanding agreements for sale. I prefer, therefore, to leave the consideration of this point until necessity requires its determination, but would provide that should the purchasers, or any of them, fail to carry out their purchase agreements, this action and the judgment should not be a bar to the plaintiff commencing a subsequent redemption action.

I would dismiss the appeal with costs.

RICHARDS, J:—I concur in the opinion of my brother Phippen that the defendants properly exercised the power of sale given by the mortgage in question, and agree that for that reason the appeal should be dismissed with costs.

I have not considered the contention raised by the appellant that the Statute of Limitations did not run in the defendants' favour, and therefore express no opinion on that point.

MANITOBA.

TRIAL.

CAMERON, J. JUNE 13TH, 1908.

ANDERSON v. DOUGLAS.

Vendor and Purchaser—Contract for Sale of Land—Written Agreement—Oral Evidence to Shew True Agreement—Admissibility — Agreement Partly Written and Partly Oral—Statute of Frauds—Rectification — Specific Performance.

Action by vendor for specific performance of a contract for the sale of land.

H. A. Robson, for plaintiff.

A. E. Hoskin, for defendant.

CAMERON, J.:—This is an action for specific performance of an agreement, dated 14th February, 1908, in which the plaintiff agreed to sell to the defendant certain lands, containing 650 acres more or less, excepting thereout certain rights of way, for $19.500, to be paid to the plaintiff as follows: "$100 cash on getting possession; $1,000 in 4 months from the date hereof; the purchaser to assume a mortgage on said land to the Canada Permanent Mortgage Corporation of $9,100; the purchaser is to transfer to the vendor the premises known as 41 Furby street at $4,100, the vendor assuming an incumbrance against same of $1,400, and the balance of said purchase money is to become payable in 3 equal annual instalments," as therein mentioned. It is further provided that "the purchaser is to assume said mortgage of $9,000 to the Canada Permanent Mortgage Corporation and the interest from date hereof," and that "a note for $1,000 for the payment due in 4 months given by the purchaser to the vendor is collateral hereto."

It appears on the evidence, which, it seems to me, is clearly admissible, not for the purpose of interpreting the written contract, but to shew that it ought to be different from what it actually is (per North, J., in Olley v. Fisher, 34 Ch. D. 319), that certain terms of the real contract in this case are not contained in the written agreement.

The various particulars left in verbal understanding and not reduced to writing appear to have been as follows:—

The acreage was not 650, and the real purchase price not $19,500 as stated. The real purchase price was to be calculated at $30 per acre, and a deduction was to be made from $19,500, according to the area occupied by the specified rights of way.

The amount to be so allowed was to be deducted from the second payment of $1,000. Nothing of this appears in the written agreement.

Possession of the farm property was to be given on 1st March. The written agreement contemplates immediate possession.

The insurance on the buildings on both properties was to be adjusted as of the date of the agreement, and the payment in respect of this to be adjusted on the said second payment. The written agreement is silent as to this.

The taxes were to be adjusted as of the same date, and the payment in respect of this to be adjusted also on the said second payment. The written agreement is silent on this point also.

The interest on the mortgage on Furby street property was to be adjusted in the same way. The written agreement does not deal with this.

There was a further understanding, according to the plaintiff's evidence, that the title had to be satisfactory. The written agreement provides that the purchaser accepts the title of the vendor.

The Statute of Frauds in no way prevents either party from shewing that the writing on which the other insists is not the real agreement. Then there is nothing that can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement because it is not in writing: Pollock on Contract, 7th ed., p. 511; Price v. Ley, 4 Giff. 235. The question is fully discussed in the comprehensive judgment of Anglin, J., in Green v. Stevenson, 9 O. L. R. 671, 5 O. W. R. 761, which is directly applicable.

The agreement now in question was drawn by the plaintiff with the preliminary agreement (filed at the trial) before him. The provisions of the latter were amplified and some of them altered in the formal instrument, which was executed in the presence of, and after discussion with, the defendant's solicitor. Parts of the real contract were ap-

parently left designedly in parol. I find no evidence of fraud, accident, or mistake, or of an intention, common or unilateral, to embody the whole of the terms of the contract in writing. There is before the Court, therefore, a parol contract of which some, but not all, of the terms are evidenced in accordance with the requirements of the Statute of Frauds. As Mr. Justice Anglin says (p. 679): "By no known process can those terms not so evidenced be put in a writing not signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if that would suffice to enable the Court to avoid the effect of the statute; no part performance to satisfy it in the absence of a written memorandum."

It was argued that if the evidence disclosing terms not set out in the written contract were admissible, the plaintiff could now amend his pleadings and ask for a rectification of the agreement in accordance with the evidence and for specific performance of the agreement thus rectified. Mr. Robson relied upon Martin v. Pycroft, 2 DeG. M. & G. 785. It is to be observed that in that case Lord Justice Knight Bruce was carefully guarded in his statement: "Either the parties (to the agreement) sued in equity upon it may perhaps be entitled, in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the unwritten term." The question has been a vexed one, and some of the decisions are not easily reconcilable.

Mr. Justice Anglin in Green v. Stevenson says that he cannot reconcile Martin v. Pycroft with the current of authority.

Sir Edward Fry in his work on Specific Performance, p. 352, says the current of authorities is not uniform, but seems to hold the proposition established that a plaintiff could not be allowed to sue for the specific performance of a contract with a parol variation. This is also the conclusion drawn from the English authorities by Mr. Justice Story: Eq. Jur. p. 161.

Sir Frederick Pollock says (Contracts, p. 510): "A party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract:" Townshend v. Stangroom, 6 Ves. 328. In discussing Martin v. Pycroft as an

exception to the rule, he says that what that case settles is that it is open to the plaintiff to admit a parol addition "made for the defendant's benefit," and so enforce specific performance.

In the light of this authoritative interpretation placed by Sir Frederick Pollock on the decision in Martin v. Pycroft, the plaintiff in this case might have found his position stronger if the only verbal variation or addition were that concerning the interest on the mortgage on the Furby street property, in which event Martin v. Pycroft might be more directly in point. But the other parol variations, to my mind, make that case wholly inapplicable, even if it has not been practically overruled by the weight of authority, as Mr. Justice Anglin holds.

Before there can be rectification of an instrument, there must be clear evidence of a common intention that the document to be rectified should contain the whole contract, and that the omitted terms were left out owing to fraud, accident, or mistake. If the writing purports to contain the whole contract but omits some material part thereof, and there were no common intention to put the whole contract into writing, the document cannot be rectified.

If this were not so, the Statute of Frauds could never be enforced: Williams on Vendor and Purchaser, p. 701. There is nothing whatever in the evidence before me to indicate that the written agreement does not contain all that it was intended to contain, and that all the verbal conditions and undertakings were not intended to be left in parol. In other words, what has resulted here, viz., a contract partly written, partly verbal, is exactly what was intended. I find no evidence of "a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed:" Pollock on Contracts, p. 575.

In Attorney-General v. Sitwell, 1 Y. & C. Ex. 559, Alderson, B., at p. 583, says: "I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds." Lord St. Leonards in Davies v. Fitton, 2 Dr. & War. 232, says: "I cannot decree specific performance with the variation of a new term, no matter how inconsiderable that term may be, as, for instance, the payment of taxes, nor how clearly that term may be proved by parol evidence."

It is true that it was held in Olley v. Fisher, 34 Ch. D. 367, that the Court has jurisdiction since the Judicature Act to maintain an action to rectify a written agreement upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed. But in Olley v. Fisher the Statute of Frauds was not, and could not be, pleaded, in view of part performance.

In May v. Platt, [1900], 1 Ch. 621, Farwell, J., states that, where the vendor first asks the Court to rectify the agreement and then to grant specific performance of the agreement as rectified, "that is contrary to the well-settled practice, established by cases such as Woolam v. Hearn, that a plaintiff cannot obtain specific performance of a written contract with a parol variation," and quotes in support of this view the judgment of Lord St. Leonards in Davies v. Fitton, above referred to. May v. Platt and Davies v. Fitton were followed in Thompson v. Hickman, [1907] 1 Ch. 550.

Joynes v. Statham, 3 Atk. 387, was cited, amongst other cases, by Mr. Robson. But in Woolam v. Hearn, 7 Ves. 211, Sir William Grant points out that Lord Hardwicke's decision in that case was that the omitted term there in question was merely explanatory.

In Townshend v. Stangroom, 6 Ves. 337, 338, Lord Hardwicke states that the report of Joynes v. Statham is inaccurate. Note is also to be made of the remarks of Lord Redesdale in Clinan v. Cooke, 1 Sch. & Lef. 38, on the same case. Jarvis v. Berridge, L. R. 8 Ch. 351, was not an action for specific performance and the Statute of Frauds was held by Lord Selborne to be irrelevant. Robinson v. Page, 3 Russ. 114, does not appear to me in point. Nor do Pember v. Mathers, 1 Br. C. C. 52, and Tenham v. Child, 1 Br. C. C. 99, seem to me to strengthen the plaintiff's contention. In Woolam v. Hearn, 7 Ves. 211 (and 2 White & Tudor's Leading Cases), it was held that, though a defendant resisting specific performance may go into parol evidence to shew that, by fraud, the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining specific performance with a variation.

It, therefore, seems to me clear that, in the first place, the agreement in question cannot be rectified as urged by the plaintiff at the hearing, and, in the second place, even if it were rectified by incorporating therein the terms left in parol, the plaintiff would be left with an unenforceable

agreement on his hands. No rectification is possible, and the writing cannot be enforced because it is not the agreement, and the agreement cannot be enforced because it is not in writing.

The plaintiff therefore fails in his action, which must be dismissed.

BRITISH COLUMBIA.

HUNTER, C.J. JUNE 4TH, 1908.

SINGLE COURT.

REX v. REGAN.

Criminal Law—Vagrancy — Frequenter of Bawdy House—Statutory Offence — Necessity for Request to Person Charged to Give an Account of herself—Police Officer.

The accused was convicted on 12th May, 1908, by the police magistrate for the city of Victoria, on an information charging the accused "for that within the space of 3 months last past, to wit, on the 6th day of May, 1908, at the city of Victoria, and on other days preceding that day, you were a loose, idle, and disorderly person, and an habitual frequenter of a bawdy house, to wit, 40 Chatham street, in the said city, and did not give a satisfactory account of yourself."

This was a motion for an order nisi to shew cause why a writ of certiorari should not issue to quash the conviction, on the grounds, inter alia, that there was no evidence to warrant the conviction, and that the accused had not been afforded an opportunity or asked to give an account of herself.

The evidence upon the return was that of Detective O'Leary of the Victoria police force, who stated that the accused was a frequenter of the house in question, and that her reputation was that of a sporting woman, a prostitute, and that the character of the house in question was that of a sporting house, a house of prostitution; that he had gone into the house on several occasions, the last time about two weeks previous to the hearing of the charge, and on one occasion asked the accused what she was doing there; the accused replied that she was "playing a piano."

Constable Heather and Sergeant Carson, both of the police force, also gave evidence as to the general reputation of the house as a house of prostitution, and as to the character of the accused. Cleo de Vere, the landlady of the house,

gave evidence to the effect that she resided in said house, and that the same was a house of prostitution, a house of ill-fame, and that the accused had been working for her as a piano player for about three months and was still so working, and that she was paying her wages therefor.

R. C. Lowe (Moresby & O'Reilly), for the motion, cited Regina v. Levecque, 30 U. C. R. 509, and contended that the statutory condition which would warrant the conviction of the accused had not been complied with, inasmuch as the accused had not been expressly asked by Detective O'Leary to give "an account of herself." No matter how strong the evidence is otherwise, if the statute is not complied with the proceedings are void.

G. A. Morphy, for the magistrate and Crown, contra.

HUNTER, C.J., held that the statutory conditions had not been complied with, inasmuch as the accused had not been expressly asked to give an account of herself, and intimated that, when a person is charged with an offence of this nature under the Code, the person asking the accused for an account of herself should disclose the fact that he is a police officer, and then demand an account of the accused from the accused.

Motion granted and conviction quashed.

BRITISH COLUMBIA.

HOWAY, Co. C.J. JUNE 9TH, 1908.

COUNTY COURT OF WESTMINSTER.

JOHNSTON v. HADDEN.

Costs—Scale of—"Amount Recovered"—Money Paid into Court.

Appeal by defendant from taxation of plaintiff's costs of an action in the County Court. The question was whether the taxing Master was right in taxing the costs on scale "A."

J. P. H. Bole, for defendant.

W. G. McQuarrie, for plaintiff.

HOWAY, Co. C.J.:—In this action plaintiff claimed $121.75. The defendant paid into Court $101 and costs. The action went to trial. Judgment was given for the plaintiff for the full amount claimed.

On what scale shall the costs be taxed? The plaintiff contends on scale "A.," being that applicable where the sum recovered exceeds $100, and does not exceed $250. The defendant contends on the scale applicable to over $10 to $25.

The question depends on what is the amount recovered.

In McLean v. Dove, 7 W. L. R. 365, I held that moneys duly tendered and subsequently paid into Court are not recovered in the action.

But I think that money paid into Court is in a totally different situation; it is money recovered in the action: Bayliss v. Lintot, L. R. 8 C. P. 345; Parr v. Lillycrap, 32 L. J. Ex. 150.

The test, as I understand it, is, was it necessary for the plaintiff to bring his action in order to obtain the money? If it was, then he recovers all moneys found to be due to him in that action.

The case of Johansen v. Elliott, 7 W. L. R. 785, decided Judge Lampman, is cited by the defendant. Although the case is very meagrely reported, I cannot see but that the plaintiff there by his action recovered the moneys paid into Court and the excess also.

The point, if I may say so, is well put by Bramwell, B., in the argument in Parr v. Lillycrap, 32 L. J. Ex. at p. 151, replying to counsel: "Suppose an action is brought for £25, and £15 is paid into Court, and the plaintiff goes on and recovers at the trial £10 more, you would say the plaintiff is not entitled to costs, although he gets all he sued for." Later on in his judgment the learned Baron says: "The payment then, as in this case, is brought about by means of the action, and the plaintiff therefore recovers the amount."

The plaintiff having "recovered" in this action $121.75, the costs will be taxed on scale "A."

By consent, there will be no costs of this application.

ALBERTA.

STUART, J. JUNE, 1908.

TRIAL.

McDOUGALL v. KERR.

Landlord and Tenant — Lease — Special Clause—Defect in Building—Neglect of Landlord to Repair—Tenant Leaving Building—Liability for Rent—Distress — Excess—Damages—Tender—Amount of Rent Due.

Action by a lessor against a lessee for an injunction and damages, in the circumstances stated in the judgment.

H. H. Parlee, for plaintiff.

H. H. Robertson, for defendant.

STUART, J.:—I think this action must be dismissed. It is true that the lease contains a special clause which provides that the lessor, the defendant, must, in case any defects arise in the building owing to the settling of the walls, make the same good to the lessee, and it is also clear, I think, that the interpretation of this clause should be that the lessor was bound to remedy the defects herself and not merely to reimburse the lessee for any expense he might incur in repairing the walls himself. But, although this is the case, I am of opinion that the plaintiff never suffered any damage arising from the existence of the defects which it is clear did really exist. The plaintiff went of his own accord to the building inspector on the 27th April, just as the beginning of another month was approaching, and asked for a report on the condition of the building, and received, it is true, a certificate that it was in a dangerous condition, but it does not appear that the inspector took any further steps to prevent danger or accident to the public who were daily passing the building, and I therefore conclude that there was no such grave and immediate danger as would justify the plaintiff in rushing out of the building as he did. If there was, I think the exit would have occurred on the 28th or 29th instead of on the 30th. Indeed, I conclude from all the circumstances that the real motive actuating the plaintiff in what he did was, not to escape danger, but to escape, as he

hoped, liability for another month's rent which would fall due the next day. The inspector stated that any immediate danger could have been avoided by the construction of a temporary support. The plaintiff knew the condition of the building fairly well as early as February, because he then complained to the defendant's agent about it. When damages are likely to arise owing to the breach of one party to a contract of a covenant contained in it, it is the duty of the other party to do what he reasonably can to lessen that damage as far as possible, and I think the plaintiff should have done something to prevent immediate danger, instead of vacating the building entirely and then claiming full compensation for the damages resulting to himself therefrom. Besides, it does not appear that he has suffered damage at all owing to his leaving the building. The conclusion I draw from the evidence is, that he was making little, if any, profit in his business, and that he was really looking for an excuse to get out of his heavy obligation as to rental. It was contended by the plaintiff that the seizure was excessive, but I do not think that this contention can be sustained. It was quite impossible for the defendant to estimate closely what amount could be realized from the sale of the groceries and fixtures, and I do not think the seizure of the whole was unreasonable, in view of the evidence as to its value.

With respect to the amount of rent due, I am of opinion that damages cannot be recovered for seizure for an excessive claim without a tender of the amount actually due. No such tender was made.

As to the question of the furnace, it was not shewn that the plaintiff had suffered damage, or at least to any definite amount. He, no doubt, yielded to his sub-tenant's claim under the impression that he would be entitled to deduct the amount from his own payments to the defendant, but there was no evidence of any kind which would tend to shew that the sub-tenant had really suffered any damage or that he was entitled to deduct anything from the rent payable to the plaintiff. It appears, indeed, that the plaintiff bought a stove, and, no doubt, he was put to some trouble in buying this and putting it up, but I have no data from which to estimate the amount which should be allowed for this. The plaintiff still owns the stove, and I presume it is worth what he paid for it.

The only question remaining is, whether, as the action is framed, I can decide the point as to the amount of rent which was actually due. The action is for an injunction and for damages. The sum of $300 was paid into Court, and this must, I think, be taken as representing the goods. If only $250 were due, I should be bound, I think, to direct a release of the excess, namely $50, and its payment out to the plaintiff. It is, therefore, necessary for me to decide the dispute as to the additional $25 which it is contended was deferred under a special agreement. It appears to me to be clear from the evidence that it was quite distinctly understood that this proposed arrangement was only to take effect when an agreement to that effect was signed by the parties. This was never done, and therefore the old rental remained payable.

The result is that the action will be dismissed with costs. There will also be an order for payment out to the defendant of the sum of $300 standing in Court.

ALBERTA.

HARVEY, J. JUNE 4TH, 1908.

CHAMBERS.

UNION INVESTMENT CO. v. PULLISHY.

Costs—Taxation—Defendants Severing—Right of Defendants to Separate Sets of Costs—Separate Defences Delivered by same Salicitor—Discretion of Taxing Officer—Items of Bills—Instructions to Defend—Attempted Examination for Discovery—Conduct Money—Attendance of Solicitors—Third Party Notice—Witness Fees at Trial—Affidavits of Defendants.

In this action 16 defendants were sued as joint and several makers of a promissory note. They defended through 3 different firms of solicitors, and 5 statements of defence were delivered. Judgment was given for the defendants with costs, and on taxation of the costs the taxing officer allowed the additional costs occasioned by the defendants severing in their solicitors and in their defences, and the plaintiffs appealed.

O. M. Biggar, for plaintiffs.

C. F. Newell, for defendants.

HARVEY, J.:—The trial Judge had before him a copy of all the pleadings, and therefore knew how the defendants were represented. Two counsel only appeared at the trial, and I find the trial Judge's fiat indorsed on his copy of the pleadings as follows: "Judgment for defendants with costs. Two counsel fees, $75 each." If the merits of the case justified the withholding of the costs due to the severance, the trial Judge was the one best able to exercise a discretion, but he not merely gave no such direction,but apparently intended the reverse, as indicated by two equal counsel fees for the counsel representing the different defendants. If that was his intention, there is no doubt the taxing officer would have no discretion, but, even if he did not intend to dispose of the question, I am unable to see any reason why the costs that have been allowed should be disallowed. It was urged that under the authority of Bull v. West London School Board, 34 L. T. 674, only one set of costs should be allowed. In that case two persons who were partners were made defendants, for discovery only, in respect of a matter of the partnership business, and the Judge who disposed of the case allowed them only one set of costs. I fail to see any analogy in principle to the present case, in which each defendant was sued in respect of his several contract, and in which each might have a separate and distinct defence. As a fact many of the defences are identical, but not all, and I can conceive of no obligation on the part of any defendant on being sued to hunt up some other defendant's solicitor instead of his own. The principle is discussed in Melbourne v. City of Toronto, 13 P. R. 346, to which reference may be made.

As regards the separate defences by the same solicitors, the allowance or disallowance would appear by Beattie v. Lord Ebury, 29 L. T. 419, to be largely a matter for the discretion of the taxing officer, but in any case I see no ground for interfering with his action. In both cases the defences differ in part, and in one case very materially.

I am of opinion that the solicitor is entitled to receive and charge for instructions to defend from each defendant. It is only after receiving these instructions that he knows that the defences are identical, even in the cases where they are so. The solicitor should not, of course, be allowed for more than one perusal of the same statement of claim, but this appears to be dealt with properly by the taxation, as well as the instructions for pleadings, which are limited to the

actual pleadings, and not governed by the number of defendants.

The plaintiffs attempted to examine some of the defendants for discovery. Owing to snow blockades or other interruption of train services they were not able to attend at the time appointed, but, having attended as soon after as they were able, they claimed a further sum than had been paid them for conduct money. The plaintiffs refused to pay this, and abandoned the examination. It is contended that having failed to appear at the proper time, the defendants are not entitled to this sum. The clerk has allowed it, however, but has disallowed the costs of the defendants' solicitors on attending. In my opinion, the defendants having done all that was in their power in response to the plaintiffs' subpœna, the fact that they were prevented by something beyond their power and unforeseen should not prejudicially affect them. I have had some doubt, however, whether their witness fees on such an examination could properly be included in a bill of costs of the action. There is no doubt that under the Rule the party holding an examination for discovery must bear the costs of it in the absence of any order to the contrary, and it seems only reasonable that it should be as costs of the action. If a witness is not paid the proper conduct money, he may refuse to give evidence until paid, but I can see no reason why, even though the evidence may not be given or may be given without his having received the proper fees, he should not still be entitled to them. I hold, therefore, that these fees were properly allowed. The party being examined is entitled to have his solicitor or counsel present, and the proper costs of such solicitor or counsel are costs of the examination and to be borne by the party at whose instance the examination is being held. The solicitor's proper costs, therefore, for instructions and attendance should be allowed.

Some of the defendants served a third party notice, but took no further steps. In my opinion, the costs of the notice are not costs of the action, but of an independent proceeding which a defendant is authorized to take, and, in the absence of an order, should not be allowed. I was asked to order that they be allowed, but this was objected to. It appears to me that the trial Judge is the most suitable person to deal with this, but, in any event, I decline to make any such order on this appeal from taxation. These costs, therefore, should be disallowed.

Objection is taken to the allowance of separate affidavits by each defendant to prove his attendance so as to entitle him to his witness fees. I find no provision in our Rules or the English Rules for this affidavit, but I am aware that it has been the practice to require such an affidavit before allowing witness fees. The Ontario Rule (1173) requires that this affidavit be made by the solicitor or his clerk or the client. The affidavit in this case is not an affidavit proving any disbursements for the witnesses, but only proving the defendant's own attendance and furnishing particulars shewing what he is entitled to. I see no reason why this affidavit could not be made by the solicitor as well here as in Ontario, and it is apparently in conformity with the Ontario practice that the affidavit has been required. One affidavit for each bill appears to me to be all that is at all reasonably necessary, and the bill should be amended by disallowing all but one for each bill. One affidavit would perhaps have required an extra folio or two, but that is probably more than made up by the extra folios in the bill of costs in respect of the different affidavits.

The bill will be referred back to the clerk for correction in accordance with the foregoing findings.

There will be no costs of this appeal to either party.

ALBERTA.

BECK, J. JUNE 9TH, 1908.

CHAMBERS.

RE SOLICITOR.

EX P. DAY AND HENWOOD.

Solicitor—Taxation of Bill of Costs—Review of Taxation—Necessity for Filing Objections—Rules of Court—Leave to File Objections after Issue of Allocatur of Taxing Master.

Application by the clients to extend the time for filing objections to the taxation of the solicitor's bill of costs.

G. B. Henwood, for the applicants.

The solicitor, in person.

BECK, J.:—An order was made by Harvey, J., on 28th April, on the application of the clients, for the taxation of the solicitor's bill.

The clerk issued an allocatur on 6th May. Objection was made orally before the clerk, during the taxation, to the allowance of 11 specified items. It is said that these objections were taken only after the clerk had gone over the bill and allowed them. They were, however, taken before the allocatur was signed. On 7th May the clients gave the solicitor notice in writing that they objected to the allowance of these items for the grounds thereof, and that an application would be made to a Judge in Chambers on 15th May for a review of the taxation of the said items.

This course was pursued on the supposition on the part of the clients' present solicitor that Rule 528 of the Judicature Ordinance, C. O. 1898 ch. 21, was still in force, and in reliance on the decision of Scott, J., in Re McCarthy, McCarthy v. Walker (No. 2), 4 Terr. L. R. 1, and was persisted in notwithstanding that the solicitor, by correspondence commencing on 30th April (i.e., prior to the date of the clerk's allocatur), and continuing to 6th May (the date of the allocatur), impressed upon the clients' solicitor that the objections ought to be put in writing and filed with the clerk before the issue of his allocatur, and that the clerk should make his decision upon the items in view of the written objections. This view was urged by the solicitor on the ground that the English Rules O. 65, r. 27 (39) et seq., were in force notwithstanding the decision of Scott, J., in Re McCarthy to the contrary. The application did not come before a Judge till 26th May, and was finally disposed of two or three days later by Harvey, J. He dismissed the application, on the ground that the clients' procedure was wrong in view of the fact that a new Rule had been substituted for Rule 528 by the Statute Law Amendment Act, 1907, sec. 7, sub-sec. 2 (6). This amendment had escaped the notice of both parties to the application until called to their attention by Harvey, J.

The application now before me is one by the clients to extend the time for filing objections to the taxation. I undoubtedly have power to extend the time by virtue of Rule 548 (Eng. O. 64, r. 7.)

I shall always be strongly disposed to relieve parties from the results of the mistakes whether of themselves or

of their solicitors. It is only where irreparable mischief would be done by acceding to a tardy application that the person who has failed to act within the proper time ought to be the sufferer; the objection of lateness ought not to be listened to where any injury caused by the delay may be compensated for by the payment of costs or otherwise: see per Bramwell, L.J., in Atwood v. Chichester, 3 Q. B. D. 723. Here there was a mistake on the part of the applicants' solicitor. Though it is, indeed, true that he acted with full notice that the solicitor contended that his mode of procedure was wrong, the solicitor's grounds for his contention were also founded on a mistake. But, had the solicitor been right in his reasons, I should still in this. as in every case where the other party can be compensated by costs or otherwise for the results of a bona fide mistake, always give relief to the party making the mistake, and I should take the same course whether the mistake were that of the client or his solicitor.

I will therefore grant the present application, making the costs of the application payable by the clients forthwith after taxation, and imposing the liability on the clients that the amount ultimately found due to the solicitor shall bear interest at the rate of 8 per cent. per annum from the date of the original allocatur.

If authority were needed for the order I now make, it will be found in Re Furber, 42 Sol. Jo. 613. That is a decision of the Court of Appeal. It was a case of omission to bring in objections. Kekewich, J., made an order setting aside the certificate of taxation and directing it to be resigned and dated as at a later date in order to allow the objections to be carried in. On an appeal from that order, the Court of Appeal, saying that "there had obviously been a blunder and a miscarriage of justice," dismissed the appeal without costs.

Scott, J., in Re McCarthy (supra) extended the time for review of taxation where the incorrect procedure and delay arose, as it appeared, from the misunderstanding of the effect of the Rules in that behalf, and of that decision I approve.

Objection was taken by the solicitor that, although the new Rule 528 requires that the objections are to be filed with the clerk within 24 hours "after the taxation" (which, agreeing with Scott, J., in Re McCarthy, I take to mean the conclusion of the taxation, that is, the making of the allo-

catur), the English Rules are in force which require written objections to be filed with and dealt with by the taxing Master before the making of the allocatur, and that therefore the applicant cannot succeed because he has not asked that the allocatur be set aside so as to enable this to be done. I do not think it was ever intended that, in addition to our own Rules 528 and 529, any of the English Rules relating to review of taxation should also be in force. I think our own Rules correspond to the somewhat casual practice which was in vogue in the earlier days of the Territorial Court, when the practice generally was and was intended to be much less exacting and formal than the English practice. In coming to this conclusion, I am again agreeing with the decision of Scott, J., in Re McCarthy.

It was, therefore, in my opinion, unnecessary to ask that the allocatur be vacated.

As there is no suggestion that the clients' solicitor was labouring under any mistake so far as relates to the specifying of his grounds of objection to the bill, I think he should be confined to the objections which he has already stated in writing, and the order will therefore so provide.

ALBERTA.

BECK, J. JUNE, 1908.

CHAMBERS.

RE SOLICITOR.

EX P. DAY AND HENWOOD.

Solicitor—Taxation of Bill of Costs—Tariff of Costs—Conclusiveness on Taxation between Solicitor and Client as to Charges for Services Covered by Tariff—Rules of Court—Items of Bill Objected to — Counsel Fees—"Retainer" Fee—Special Retainer of Counsel—Fee not Paid in Cash—Advising on Evidence—Other Fees—Charges not Prescribed by Tariff — Fiat for Counsel Fees Granted ex Parte—Effect of—Appeal from Taxation.

An appeal by the clients, the applicants for taxation of a bill of costs rendered by the solicitor, from the taxation thereof by the clerk of the Supreme Court.

G. B. Henwood, for the appellants.

The solicitor, in person.

BECK, J.:—The solicitor, who acted as counsel for the defence at various stages in the case of Hayes v. Day, rendered his bill of costs in that behalf to both Day, the defendant, and Mr. Henwood, Day's solicitor, and the order for taxation was made, in the usual Chancery form, with a provision for payment by both Day and Henwood.

Eleven items are objected to. Some of these objections necessitate a decision upon the question whether the tariff of costs is conclusive with respect to items of charges for services which appear in the tariff.

The tariff was made under the authority of Rule 533 of the Judicature Ordinance, C. O. 1898 ch. 21, which reads as follows: "In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed such fees as may be from time to time prescribed by the Judges of the Supreme Court."

The tariff is comprised in Rule 112 of the Consolidated Rules of the Court, which provides that "advocates . . shall . . be entitled to receive and take the fees prescribed by the following tariff. . . ."

In In re Harrison, 33 Ch. D. 54, it was held by the Court of Appeal that the tariff of costs made under the authority of the English Rules is applicable to taxations between solicitor and client, as well as between party and party.

Hamilton v. McNeil (No. 2), 2 Terr. L. R. 151, held that the tariff authorized by the Judges of the Supreme Court of the North-West Territories, under the Judicature Ordinance (R. O. 1888 ch. 58), was also applicable to taxations both between party and party and solicitor and client. Independently of the terms of the Rule under which the present tariff was made, an intention that the tariff should apply to taxations between solicitor and client is indicated by item 74: "Common letters, including necessary agency letters, higher scale, 50 cents, lower scale, 25 cents; as between solicitor and client the clerk may increase the fee for special and important letters to an amount not exceeding $5."

So too in England, in consequence of the decision in In re Harrison (supra), the following proviso was added as an

amendment to O. 65, r. 27, regulation 48, which relates to "refreshers" only: "Provided that in the taxation of costs between solicitor and client, the taxing officer shall be at liberty to allow larger fees, under special circumstances to be stated by him."

In In re Geddes and Wilson, 2 Ch. Ch. 447, it is said: "But it was argued, as I understood the learned counsel for the solicitors, that the tariffs which have from time to time been promulgated by the Court are as between party and party only, and are not binding as between solicitor and client. But surely that these tariffs have been in the main binding as between solicitor and client nobody can ever have doubted; for it is according to these tariffs and no other that all such taxations have always proceeded; and without them the Masters would have had no guide in any taxation of that character. Business may be done as between solicitor and client for which the tariff made no provision, but for business which the tariff does specify it is binding for all purposes, with, I believe, the single exception of counsel fees, an exception which was made very early in the history of the Court, and has ever since been recognized." See also In re Totten, 8 P. R. 385. Our own tariff, however, deals with counsel fees. There is a sub-heading "counsel fees," and, while fees are absolutely fixed in some instances, in the remainder it is provided that the amount may be increased by a Judge.

In my opinion, therefore, our presently-existing tariff of costs is binding as between solicitor and client so far as any charges made by the solicitor are for services for which there is an allowance provided by the tariff.

The question as to what extent this Rule can be invaded by agreement does not arise in the present case. It is dealt with in the two cases already cited, In re Geddes and Wilson and In re Harrison, and in Ford v. Mason, 16 P. R. 25, and McKee v. Hamlin, ib. 207. As a corollary to the foregoing rule, it follows that for services in respect for which no item appears in the tariff, the solicitor is to be entitled to be allowed and recover a reasonable and proper charge: In re Richardson, 3 Ch. Ch. 147.

These propositions, I think, enable me to deal with all the contested items except that for "retainer."

The item, as it appears in the bill of costs, is: "To retainer herein for defendant, $100." On the taxation the solicitor produced a fiat signed by one of my brother Judges,

comprising, amongst others, the following item: "To retainer fee when Mr. McCaul's services were engaged and retained for the defendant as his counsel in the above matter, and consultation in connection therewith, $100." The objection to this item is that it is "not prescribed by the tariff and cannot be allowed." I must treat the item as a charge for a retainer only. Doubtless, some instructions were given by the solicitor to the counsel at the same time involving a consultation, but I must assume, especially in view of the second contested item, that there was nothing more than what was proper and incident to the briefing of counsel.

No retaining fee is allowable to a solicitor as such, nor in his capacity as counsel, if he be also solicitor in the matter in question, except to the extent that the same has been actually paid as a voluntary gift by the client to the solicitor after full knowledge on the part of the client that even if successful the amount could not be recovered from the opposite party: In re McBride, Farley v. Davis, 2 Ch. Ch. 153; In re Geddes and Wilson (supra); McKee v. Hamlin, 16 P. R. 207. Where counsel, who is not the solicitor in the matter in question, is retained, and accepts a special retainer, there, no doubt, arise obligations on his part and on the part of the client, or at all events, of the solicitor.

In this jurisdiction, speaking from a long experience, I am quite sure there is no settled rule or understanding on the part of the profession as to what these obligations are. I suppose I may assume that the Court and the profession would accept, with, however, some limitations and exceptions, the rules prepared by the (English) Bar Committee, approved by the Attorney-General and by the council of the Incorporated Law Society, 1892, which are printed in the Annual Practice, 1908, vol. ii., p. 740; Yearly Practice, 1908, p. 1497. Under those rules the council have decided that a special retainer of counsel is not binding until the fee thereon is paid in cash: Annual Prac., 1908, vol. ii., p. 741.

Whether, if it were established, as it is not even asserted in the present case, that the solicitor for the client had expressly agreed with counsel to pay him a special retaining fee, the Court might hold the solicitor to his agreement by reason of his being an officer of the Court, I am not called upon to decide.

It is evident from what I have said that I must disallow the item of $100 for retainer.

the amount for which the client is liable. I think, therefore, that a Judge should not be asked to fix a counsel fee in a case which has come before another Judge, unless notice be given to the other party. I am satisfied that the learned Judge who gave the fiat would have acted upon this view had his mind been directed to it, and that he granted the fiat ex parte entirely owing to inadvertence.

The matter will be referred back to the clerk to deal with the bill in accordance with the opinions I have expressed, and to deal with the costs of the reference in accordance with the order for taxation, having regard to the result of the revised taxation. I give no costs of the appeal.

ALBERTA.

STUART, J. JUNE 10TH, 1908.

TRIAL.

GRAVES v. MASON.

(TWO ACTIONS.)

Vendor and Purchaser—Contract for Sale of Land—Purchase Money Payable by Instalments—Action to Recover Intermediate Instalment — Equitable Defence — Absence of Title in Vendor—Burden of Proof—Dismissal of Action —Leave to Commence a New Action.

Actions by vendors to recover instalments of the purchase money of lands sold to the defendants.

O. M. Biggar, for plaintiffs.

H. H. Hyndman, for defendants.

STUART, J.:—In these actions I think the plaintiffs fail. The absence of title is clearly a good defence in equity where the action is to recover the last instalment or for specific performance, which two remedies, though different perhaps in form, must, I think, in the long run amount to the same thing. See Farrer v. Nash, 35 Beav. 167, and Brewer v. Broadwood, 22 Ch. D. 105, to which I referred on the argu-

ment, and which are cited by Mr. Justice Beck in the case of Nimmons v. Stewart, recently decided by him at Calgary, and which is not yet reported. If absence of title is a good defence in respect of the last instalment, I cannot see how it can be otherwise where the action is upon an intermediate instalment, as in the present cases. It might be otherwise at law, but certainly not where equitable defences are available. The point was not raised at all, as far as I can judge from the report, in Schurman v. Ewing and Moore. Indeed, I understood Mr. Biggar to admit this and to rest his case really upon the ground that the defendants had not shewn the absence of title. I do not think this contention can be upheld. The defendants by cross-examination of the plaintiff Ferris shewed that neither he nor his co-plaintiff was the registered owner of the land in question, and that neither of them held a transfer which could be registered. That, I think, is as far as the defendants could be called upon to go. It was surely not incumbent upon them to go on and prove the absence of the right to call for a title. To cast such a burden upon them might lead to the peculiar result that they would have to fight another case against the plaintiffs for somebody else from the other side or in the plaintiffs' rear, as it were. At the close of the cross-examination of Ferris, the situation was, that, prima facie, the plaintiffs had not title, and I think the burden was then shifted, and that, by re-examination, the plaintiffs should have shewn the existence of a right to call for the title. I am bound to say, however, that I am not quite convinced that, not as a matter of evidence, but as a matter of law, they would have had a right to proceed to such proof. It seems to me the objection I have already referred to would stand in the way. The defendants would have been still forced to contest another case upon another agreement between the plaintiffs and some one else altogether. But, of course, in the circumstances it is not necessary to decide that point.

What I have suggested as to this last point is, however, one reason why, in my discretion, I do not feel inclined to accede to the plaintiffs' request to allow the case to stand over for the hearing of further evidence. No doubt, in a proper case, a trial Judge may, in his discretion, call for further evidence before adjudicating between the parties, but I do not think the present is a proper case.

The actions will, therefore, both be dismissed with costs, but I think this should be with liberty to the plaintiffs to

commence another action if they are so advised. The effect of my present judgment may, or may not, be to annul the agreement altogether, but that should be decided in another action, and not in these. Here neither party has asked for cancellation. The defendants simply defended and entered no counterclaim. It is therefore impossible for me to give any judgment for cancellation or for repayment of moneys already paid, as was suggested by Mr. Hyndman.

SASKATCHEWAN.

RIMMER, LOCAL JUDGE. JUNE 1ST, 1908.

CHAMBERS.

CROWN LUMBER CO. v. FITZSIMMONS.

Writ of Summons—Irregularity—Writ Signed by Clerk of Court instead of Local Registrar—Practice—Motion to Set aside Service of Writ—Grounds.

Application by the defendants in an action in the Supreme Court to set aside the service of a writ of summons, on the ground that the registrar signed the writ as clerk of the Court instead of local registrar.

A. E. Vrooman, for the defendants.

E. W. F. Harris, for the plaintiffs.

RIMMER, LOCAL JUDGE:—This is an application by the defendants to set aside service on them of the writ of summons. The ground of the application is that the copies of the writ served upon the defendants purport to be signed "W. D. Ebbels, clerk of the Court," instead of "W. D. Ebbels, local registrar." Except that the copy purports to be of a writ issued in the Supreme Court of Saskatchewan, Judicial District of Cannington, it is entirely in form A of the schedule of the Rules of Court, the expression "clerk of the Court" being retained throughout. Except so far as inconsistent with the Judicature Act, the Rules of Court in force in the Supreme Court of the North-West Territories were continued by sec. 55 of the Judicature Act. I do not dis-

cover anywhere an express amendment of form A. None has been pointed out to me by the defendants' counsel.

The only provision relied on as inconsistent with form A is sec. 42 of the Judicature Act, which reads: "For each judicial district the Lieutenant-Governor in council may appoint a sheriff and also a clerk as officer of the Court to be the local registrar of the Supreme Court for the judicial district of . . ." and "may name the place at which such sheriff and local registrar shall reside and keep an office."

A fact of which I can take judicial notice is that the Lieutenant-Governor appointed W. D. Ebbels local registrar of the Supreme Court, for the judicial district of Cannington. Under sec. 42, above quoted, the local registrar is de facto the clerk of the Court. Rule 1 provides that "every action, except as otherwise provided, shall be commenced by writ of summons in form A in the schedule hereto, which writ shall be issued by the clerk." Section 55 of the Judicature Act provides: "All Rules of Court in force in the Supreme Court of the North-West Territories at the time of coming into force of this Act and which are not inconsistent herewith, shall remain and be in force in the Supreme Court of Saskatchewan until they shall be altered or amended by Rules of Court under this Act."

One of the Rules of Court in force which must be read with Rule 1 is 535: "The forms contained in the schedule to this Ordinance shall be used with such alterations as circumstances may require . . . ."

If the original writ is in the same form as the copy, of which there is no evidence before me, the question would have to be decided whether Rule 1 is or is not inconsistent with sec. 42 of the Judicature Act. But for Rule 535 I should have some doubt whether any authority existed for substitution of the style "local registrar" for clerk of the Court. It is open to argument that form A remains in force and is to be used just as it was previous to the Judicature Act, until Rules of Court are passed under sec. 55 altering the form.

The intention of the legislature is to be taken to make no alteration in the law beyond its explicit declaration. The only explicit declaration is that there shall be a clerk or officer of the Court, etc.

Section 6, sub-sec. 36, of the Interpretation Act has, I consider, some bearing on the merits of this application: "Whenever forms are prescribed, slight deviations therefrom,

not affecting the substance or calculated to mislead, shall not vitiate." I do not think the defendants can be considered to have been misled by the expression clerk of the Court applied to an officer who is de facto such under the Rules and sec. 42 of the Judicature Act.

The application is to be dismissed on other grounds, however. There are no merits. The defendants are not misled. They come before the Court on purely technical grounds. In doing so they must be correct in form. They have put no material before the Court to enable it to determine whether the ground is that the writ is bad as not being in accordance with the copy, or that the service is bad as not being service of a true copy, except the affidavit of their solicitor, based on information. This affidavit is to the effect that the writ and copies agree.

In such case the application should be to set aside the writ. There is no irregularity in the service. If anything, it is the writ which is irregular: Hesker v. Jarmaine, 2 L. J. Ex. 166. Had the defendants moved to set aside the writ, the case would be one for amendment on terms, if there is any irregularity: Theriault v. Evans, 4 W. L. R. 550; Cushing Bros. v. Groos, 4 W. L. R. 551.

The only grounds stated in the summons are irregularity of service. Of this there is no evidence. The application is dismissed with costs to the plaintiffs. The defendants to have 6 days to plead. No order to be drawn up.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 1ST, 1908.

CHAMBERS.

RE NELSON FORD LUMBER CO.

Company—Winding-up—Petition — Preliminary Objections —Irregularity—Failure to Indorse Petition with Solicitor's Name and Address—Indorsement of Notice of Motion Served with Petition—Sufficiency—Status of Petitioners—Foreign Company not Registered in Jurisdiction —No Agent or Office in Jurisdiction—"Proceeding in Respect of a Contract"—"Proceeding in the Court"— Dominion Winding-up Act.

Upon the presentation of the petition and application for a winding-up order, two preliminary objections were taken, as set out below.

T. S. McMorran, Regina, for the petitioners.

C. W. Craig, Moose Jaw, for the company.

PRENDERGAST, J..—It is objected, first, that the petition and copy thereof served do not comply with Rule 50 of the Consolidated Rules of the Court, passed under the authority of sec. 134 of the Winding-up Act, in that they have not indorsed thereon "the name or firm and place of business of the advocate or advocates by whom such petition is presented." But I find that the notice of motion served with the petition on the company is signed by the petitioners' solicitor, and also gives their address for service. The two, in a sense, form the one document, which, considered as a whole, supplied the company with all the information required by the Rule to be given. This, with the fact that the company have appeared on the application, seems good ground to treat the matter as a mere irregularity.

The other objection is that the petitioners, the Winnipeg Paint and Glass Company Limited, being a company incorporated under the laws of the province of Manitoba and not registered in this province, has no standing before this Court under sec. 10 of the Foreign Companies Ordinance.

I think the objection should be overruled, on the following grounds:—

1. The petition substantially brings the petitioners within the exception provided by sec. 3, sub-sec. 3, of the said Ordinance, by alleging that they have "no resident agent or representative, nor warehouse, office, or place of business in the province of Saskatchewan." If that allegation is true, it seems to follow that if they did any business in the province it must then have been—although they do not so allege in the words of the said sub-section—by travellers taking orders or by correspondence. In this respect, the first 3½ lines of sub-sec. 3 seem to be a surplusage, in the sense of being necessarily implied by the balance of the enactment.

2. Even if the petitioners do not come within the exception, this proceeding is not "a proceeding in respect of a contract," as contemplated by sec. 10 of the Ordinance. It is a matter connected with trade and commerce, of wider concern than a mere private right, and which goes beyond the particular interest which the petitioners may have in it, or the benefit which they may ultimately derive from it.

3. But the principal ground, in my opinion, is that, while it is the object of the sec. 10 to withhold the benefit of any proceeding within the jurisdiction of the Court from foreign companies who fail to comply with the Ordinance, this is not a "proceeding in the Court." This proceeding is taken under a Dominion Act, and it is regulated by the Act itself and the Rules formed under sec. 134 thereof. The Judge hearing the petition under Rule 50 is persona designata. In order to be a petitioner under the Act, it is enough to be a creditor; in the case of a company it should also shew that it is an incorporated company—which it has done here. Having done this, it is within the statute, and has not to bring itself within the Ordinance.

The preliminary objections are overruled.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 1ST, 1908.

CHAMBERS.

HOGAN v. BOOZAN.

Interpleader—Application by Sheriff—Grounds for Refusing Relief—Sale of Goods Seized without Advertising—Prejudice to Claimant—Notice —Delay in Applying—Rules of Court—Payment of Part of Proceeds of Sale to Execution Creditors.

Summons by a sheriff for an interpleader order in respect of goods seized by him under an execution against the defendant, and claimed by one Inness.

Casey, Regina, for the sheriff.

T. S. McMorran, Regina, for the claimant.

PRENDERGAST, J.:—The application on the return of the summons herein was objected to on several grounds.

It appears from admissions at the hearing, although not so stated in any affidavit, that the applicant sold the goods seized, which were not perishable goods, by private sale at an elevator, and without advertising the same pursuant to Rule 357 of the Judicature Act.

It may be probable enough that the fair market price was obtained in this case, as it is generally in such sales; yet I am not in a position to say so.

Nor can I say that the claimant, who appears to have been prejudiced by being informed of the proceedings only at a later date, might not have been made aware of the same sooner, had the sale been advertised as required. The claimant may have on those grounds a claim for damages, which the granting of relief to the applicant would deprive him of.

Then, having received notice of the claim on 12th February, the applicant took out the interpleader summons on 6th May—or nearly 3 months later. It appears that the solicitors for all the parties in the case have their offices in the city of Regina. It was urged for the applicant that he at once gave notice of the claim to the plaintiffs (execution creditors), but that they made no reply either to admit or dispute the claimant's title. This is no answer, as the applicant need not, under Rule 433, have waited more than 4 days for a reply, and could have then taken out the summons. "The sheriff must make his application without delay, or he will be refused the relief:" Cababé on Interpleader, p. 39; Beale v. Overton, 2 M. & W. 534; and Mutton v. Young, 16 L. J. C. P. 165.

But the strongest objection is that the applicant has paid over to the plaintiffs part, being about half, of the proceeds of the sale. It is true that, at the time, he had not yet received notice from the claimant, but he did so within 2 months of the levy, contrary to sec. 3 of the Creditors' Relief Ordinance. Then, after stating in his affidavit in support of the summons that he was willing to pay or transfer into Court the full amount of the levy, less costs, the applicant stated on the hearing, through his counsel, that this was a clerical error, and that he was only willing to pay over about half, being what is left in his hands after paying $110 to the plaintiffs.

"The sheriff cannot apply unless the goods or money in question are actually in his hands:" Scott v. Lewis, 2 C. M. & R. 289.

"If the sheriff pay over the proceeds of an execution to the judgment creditor, he is not entitled to relief:" Inland v. Burhill, 5 C. P. D. 147. See also Henderson v. Watson, 23 Gr. 355.

The position taken by the applicant here is practically that he submits to the Court only part of the levy, but claims

relief as to the whole—which cannot be countenanced in this proceeding.

The application will be dismissed with costs.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 2ND, 1908.

TRIAL.

CANADIAN CO-OPERATIVE CO. v. TRAUNICZEK.

Promissory Note — No Place of Payment Mentioned — No Necessity for Presentment—Action by Foreign Company not Registered under Foreign Companies Ordinance—Note Given in Payment for Shares—"Contract Made in Connection with Business Carried on"—Note Indorsed by Plaintiffs, Payees, in Blank—No Surrender—Interest in Note—Status of Plaintiffs.

The plaintiffs, a company incorporated under the laws of the province of Manitoba, but not registered in Saskatchewan, sued the defendant on his promissory note in their favour for $150.

The grounds of defence were: first, that the note was not presented for payment; and second, that the plaintiffs not being registered under the Foreign Companies Ordinance, 1903, were not capable of maintaining the action.

Bigelow, Regina, for plaintiffs.

F. W. G. Haultain, for defendant.

PRENDERGAST, J.:—It is enough, I think, in order to dispose of the first ground, to point out that no place of payment is mentioned either in the body, or by way of memorandum on any part of, the note, it being provided by sec. 86 of the Bills of Exchange Act that in such cases "presentation for payment is not necessary in order to render the maker liable."

With respect to the second ground, I have no hesitation in saying that, if the fact were in issue, the onus would be on the plaintiffs to shew that they were registered. I say so, considering that the point is raised in the defence, and because sub-sec. 2 of sec. 10 of the Ordinance so provides.

But there are actions and proceedings that foreign companies that have not registered are capable of maintaining—their incapacity, under sec. 10, extending only to "any action or other proceeding in respect of any contract made in whole or in part in the Territories in the course of or in connection with business carried on, without registration."

The note sued on here was given for 3 shares in the capital stock of the company.

The question is, whether this transaction comes within the restriction of sec. 10; and, if not, it is not necessary that the company should have registered to maintain the action.

In my opinion, it does not. The company are not stockbrokers, and, even then, it could not be said to be part of their business to sell their own stock. The selling of shares is in the nature of a preliminary act, and it does not come within the class of business which is the normal object of the company, and for the transaction of which they were incorporated. In the United States it has been repeatedly held that "for a foreign corporation to take subscriptions to its capital stock within the domestic state" is "not to be doing, transacting, or carrying on business within the domestic state:" Payson v. Withers, 19 Fed. Cas. No. 10, 864-5 Bis. 269. In this view, this is not an action which the plaintiffs are incapable to maintain, and they do not come within sec. 10 of the Ordinance.

Another objection was taken at the trial, based on the fact that, when the note in question was produced, it was found to have the following indorsed thereon: "Canadian Co-operative Company Limited, per John McVicar,"—the defendant's contention being that the plaintiffs have no longer any interest in the same.

But a note is not negotiated by indorsement alone; there must also be a surrender. The company could have kept the note with the indorsement that it now bears, and produced it into Court as due holders. Instead of this, we find the plaintiffs' solicitor in possession of the note at the time of the trial, and producing it as the plaintiffs' property. It seems clear that the simple fact of the note bearing the said indorsement, which, moreover, is an indorsement in blank, is not enough to dispel the necessary conclusion arising from the relations of the two as solicitor and client.

The case of Jones v. England, 5 W. L. R. 83, is altogether different, as there the plaintiff indorsed the note sued upon not in blank, but to his solicitor by name. And even then,

relying on Soloman v. Bank of England, 13 East 135, an
La Chaumette v. Bank of England, 9 M. & W. 209
learned brother Newlands held that no property in the
passed to the solicitor, and, that although the latter
have sued in his own name, he could have done so mer
agent for the plaintiff.

There will be judgment for the plaintiffs with costs

SASKATCHEWAN.

PRENDERGAST, J. JUNE 4TH,

TRIAL.

SIELING v. VILLAGE OF KRONAU.

Contract—Work and Labour—Construction of Contra Abandonment — Acceptance of Part of Work Ac Done—Payment for Value of Work—Municipal Co tion—Contract not under Seal—Powers of Corpo —Receiving Benefit of Work.

The plaintiff claimed $422.50 for having dug pursuant to the following agreement:—

"Kronau, Sask., July 25,

"Agreement between H. Mutton, overseer villa Kronau, and John Sieling, re drilling of a well for of Kronau.

"I, John Sieling, do hereby agree to drill a we said village of Kronau on conditions and terms men as follows:—

"The first 200 feet at $2.00 per foot.
"The third 100 feet at $2.25 per foot.
"The fourth 100 feet at $2.50 per foot.
"Casing included.

"In case of a dry hole, half the price only charged; and in any case not to exceed $750. Henry Mutton, overseer village of Kronau, do hereby to pay John Sieling for drilling of well on above men conditions and terms.

"Henry Mutton, overseer village of K
"John Sieling."

The defence was substantially to the effect that verbally agreed between the parties that, as soon as was obtained, the plaintiff was to test the supply by

a steam pump for one day; that the plaintiff stopped boring before a supply of water was obtained, and left without making any test, and without instructions from the defendants; and that the plaintiff left the well without casing it as agreed, by reason of which the well caved in and was absolutely useless and worthless to the defendants.

S. Secord, for plaintiff.

W. M. Martin, for defendants.

PRENDERGAST, J.:—I interpret the agreement as meaning that, unless a supply of water was sooner reached, the plaintiff was bound to bore down to 354 feet, the extreme depth fixed by the limit of $750; that the supply of water contemplated was a sufficient supply of water fit for domestic purposes; and that until such supply was struck, the well would still be a "dry hole," even if water in insufficient quantity or of undesirable quality was reached before.

The plaintiff bored and cased the well to a certain depth, which he gives as 213 feet, but which I find to be 165. I so find on the evidence of Archibald Stitsworth, to whom the defendants subsequently gave the contract for completion, and who says that having taken out the casing put in by the plaintiff, he found it to be about 163 feet long, and that the well was dug about 2 feet further down. He says that at that depth, he reached soap-stone which had not been cut. He also says he asked the plaintiff how much deeper than the casing the well was, and he replied about 2½ feet. It is strange that on a fact so essential and which he could have others ascertain so easily at the time, the plaintiff did not produce a single witness, besides himself, to testify as to the depth of the well.

Having then bored that distance, the plaintiff struck water, and notified the village overseer. The latter, however, was not satisfied. He says that the plaintiff refused to either test the well or let him test it . The plaintiff admits that he was asked to bore deeper, but he would not. He says: "I asked him if they'd pay me for a wet hole, but they wouldn't, and I did not go deeper."

Whether the plaintiff was bound or not to test the well, the onus was surely on him at the trial, not having bored the full 354 feet, to shew that the water that he struck was of sufficient quantity and of good quality, and he has failed to shew that he struck a sufficient supply, while such water as he struck is proven to have been unfit for domestic

purposes. Here again, there was only one witness for the plaintiff who said he tasted the water, for the plaintiff did not do so himself—and even that witness said that it was "kind of bitter—a little bitter." His contention that because he had struck that supply, he would be entitled to be paid for a wet hole even if he did not strike a good supply by boring deeper, is untenable, in my opinion. At all events, whatever the overseer's view of the matter might have been, the plaintiff's duty was to bore the full depth of 354 feet, if need be, and then make his claim as he might conceive it to be. Having abandoned the contract, he cannot, relying on the above facts alone, recover anything on his claim.

But the defendants have accepted the part performance. They employed one Stitsworth first to test the well, and then gave the contract over to him. Stitsworth bored at the same place, using the 165 feet bored by the plaintiff. As the plaintiff's boring took up an area of about 6 inches in diameter of the surface of the ground, there was ample room for Stitsworth to bore elsewhere. Nothing compelled him to bore at that particular place. I must hold that the defendants accepted the part performance under circumstances implying a promise to pay.

The question is what the part performance was worth to the defendants.

Stitsworth first tested the well. He says he charged for this "$100 and board, making about $200." Let us say, then, $175. This does, indeed, seem exorbitant. If the water, as the overseer says, was "very, very, very bitter," there was not much object in trying to ascertain what the flow might be, and it seems that the only thing to be done was to empty the well.

Stitsworth, however, found in the casing, 40 feet from the surface, an obstruction consisting in a piece of maple 12 inches long. He also states that the plaintiff had dug a 6-inch hole and put 5-inch casing into it, and that this required the replacing of the latter by 5-inch casing. I do not think it is shewn that the hole was a 6-inch hole, although it may have so looked near the surface, nor that it was necessary in any event to change the casing. Stitsworth admits that the obstruction could be removed without lifting the casing, although saying also, "as to with or without a good deal of trouble, I don't know." For removing the obstruction and emptying the well, I will allow $75, which is for a little less than three days, on the basis of Stits-

worth having spent a week, according to the overseer, on this preliminary work.

As far as Stitsworth's boring had proceeded at the time of the trial, a good supply of water had not yet been reached. The plaintiff, for the 165 feet he bored, is then entitled only to $1 (instead of $2) per foot, or $165, from which must be deducted the $75 for Stitworth's preliminary work.

I do not take into consideration the price paid Stitsworth on his contract for boring, as I am unable to ascertain the same owing to the fact that the village provides for the board of his men, details of which were not given, and which was not done in the plaintiff's case.

The defence also raises the objection which was urged at the close of the plaintiff's case, and again on the argument, that the agreement is not under the seal of the village of Kronau, and also that the provisions of secs. 40 and 40a of the village Ordinance were not complied with.

The overseer stated in evidence that the work had been duly authorized by a majority of the resident ratepayers and by the Commissioner of Public Works, but did not say whether a petition had been drawn up in the required form, nor that the Commissioner's authorization was in writing.

I am of opinion, however, that the plaintiff is entitled to recover, on the ground that the contract is within the powers of the village, and that they have adopted the work and taken the benefit of it: Pim v. Municipal Council of Ontario, 9 C. P. 304; Canada Central R. W. Co. v. Murray, 8 S. C. R. 313; Bernadin v. Municipality of North Dufferin, 19 S. C. R. 581.

There will be judgment for the plaintiff for $90 and costs.

SASKATCHEWAN.

WETMORE, C.J. JUNE 6TH, 1908.

TRIAL.

HYDE v. REID.

Sale of Goods—Specific Articles to be Manufactured — Refusal of Purchaser to Accept—Justification for—Rescission of Contract.

Action (in a District Court) for the price of a quantity of iron sold by the plaintiff to the defendants.

R. A. Carman, Balgonie, for plaintiff.

W. B. Scott, Regina, for defendants.

WETMORE, C.J.:—The price of the iron wa
which the defendants are entitled to a credit
machine arm, leaving a balance due the plainti
of his claim of $65.40. The plaintiff's right to
amount was established. It was not seriously

The defendants counterclaim for the price o
which they allege the plaintiff requested them to
for him at Regina, to be delivered at Balgonie.
that the plaintiff required 50 pallets for use o
that he was operating, and ordered them from
ants, and sent by an agent, as a pattern, one of
which he had used in the machine, and which fi
agent appeared at the defendants' place of busi
the pattern from which the pallets were to be
difficulty that presents itself in the case is that
evidence to establish that the pattern left was t
ered by the plaintiff to the agent. The defen
factured 18 of these pallets from the pattern
shipped them to the plaintiff at Balgonie. On
fendants swore that the pallets that they made
were in accordance with the pattern. When the
rived, they did not fit the machine, and the pla
diately returned them (having first examined and
stating that they were useless, and requiring th
to grind them down so that they would fit. T
ceived back by the defendants without any pro
tion, and the balance (32) were never shipped,
fendants state that the reason they did not sh
was because they did not suit the plaintiff. Th
turned were not ground down, and were retaine
fendants; in fact, they paid no more attention
tract. The plaintiff had to purchase pallets elsev
transactions took place about July, 1906, and
heard nothing more about the pallets in questio
a year ago, when he requested a settlement for t
then the defendants set up their claim for the p

Notwithstanding the fact that there is no ev
tablish that the pattern handed to the defend
agent from which to make these pallets was not
the one delivered by the plaintiff to the agent,
standing the fact that one of the defendants sw
pallets were made in accordance with the patte
opinion that the defendants are not entitled t

their counterclaim. In the first place, there was no arrangement between these parties that the articles were to be delivered by instalments, and therefore the plaintiff was, under sec. 30 of the Sale of Goods Ordinance, not bound to receive the 18 pallets sent to him. He did not, however, refuse to take delivery or pay for the pallets on that ground. I am of opinion that the plaintiff had, under the circumstances, a perfect right to treat the contract as rescinded, and therefore the defendants are not in a position to recover on their counterclaim.

There will be judgment for the plaintiff on his cause of action for $65.40 with costs, and there will also be judgment for the plaintiff on the counterclaim for costs.

YUKON TERRITORY.

DUGAS, J. JUNE 1ST, 1908.

TRIAL.

JONES v. OKADA.

Sale of Goods—Conditional Sale—Payment by Instalments — Default — Seizure of Goods by Vendor—Acknowledgment by Purchaser of Amount Due—Chattel Mortgage by Purchaser to Vendor of Same Goods—Agreement of Vendor—Failure to Put Purchaser in Possession of Goods—Sale by Vendor—Dismissal of Action for Balance Due—Costs.

Action to recover $524.25, in the circumstances stated below.

F. G. Crisp, for plaintiff.

J. A. Clarke, for defendant.

DUGAS, J.:—On 1st April, 1905, the defendant bought from the plaintiff one 40-horse power boiler complete, with mountings, one Laidlaw-Dunn No. 6 duplex pump, and 1,300 feet (more or less) of 6-inch hydraulic pipe, then situate at the mouth of Last Chance on Hunker creek, for $1,700: the proprietorship therein to remain in the plaintiff until paid,

according to the deed of sale, though the possession was to be given immediately to the defendant.

There was a proviso by which the plaintiff would have the right, in default of payment, "' to distrain therefor upon the said goods sold, and by distress warrant to recover by way of rent reserved as in the case of demise of the said chattels, so much of the said sums due." I cite word for word.

The defendant having failed in the payment of some of the instalments, the goods were seized through one Lowden, acting as bailiff for the plaintiff. Evidently some payments had been made under this sale.

On 27th April, 1907, the defendant acknowledged himself to be indebted to the plaintiff in the sum of $500, with interest at 9 per centum from 1st March, 1907, and mortgaged the same goods to secure the payment of the said sum with interest, "to be paid by instalments of $200 on the 1st of July, $200 on the 1st of August, and $100 on the 1st of September, then following, with interest as aforesaid," the goods being released by the said plaintiff to the defendant by a writing signed by him the same date and indorsed on the mortgage of 1st April, 1905. This release could be perfected only upon an order to Mr. Lowden, the bailiff who had seized the goods.

The defendant, having failed in his payments, is now sued for the recovery of $524.25, as representing the capital and the interest thereon to the date of the institution of the action.

Several defences were set up, fraud, misconception by the defendant, he being a foreigner, and the rest, but these have been abandoned by the defendant, who now stands purely and simply upon the plea that the plaintiff, at the time of signing the second mortgage, having undertaken to release the goods, did not do so, or, at all events, in such a way as to put the defendant in immediate possession thereof.

The defendant, all though his evidence, has affirmed that when signing the second mortgage he did not owe the $500, and that he agreed to bind himself to that amount only because he was in absolute need of an immediate possession of the pipe, which would have helped him to take advantage of the April and May water to work with advantage on his claim. He says that, although he did not owe that sum, he was quite willing to pay it, as $500 would have been noth-

ing to him if he could have worked his claim at the proper time.

It appears that when the plaintiff made the seizure under the first mortgage this pipe was removed. The defendant seems to have had some suspicion as to where, but not in a way certain; yet at the trial it was proven that out of the 820 feet only of pipe which ever existed, instead of 1,100 or 1,300 as the two mortgages mentioned, 350 feet were in the possession of Wilson & Townsend, miners, on the same creek, and the balance (about 470 feet) in that of Lowden, the bailiff who acted for the plaintiff, and who was using it.

The defendant swears that he, immediately after 27th April, 1907, not receiving the pipe in question, or rather not having any means of having it delivered to him, as he did not know who had the possession or the control of it, came purposely to Dawson 2 or 3 times about the beginning of May, 1907, to see the plaintiff and obtain some means through him of becoming in possession of the pipe. Every time the plaintiff, according to what the defendant says, told him that he would see to their immediate release, and, in one instance, told him that he would give an order to Lowden to that effect.

Lowden is examined, and, on his first statement, he declares that he only received the order to deliver those goods in the latter part of May. The defendant says that he saw him for the first time only at the beginning of June. About this I believe it can be said that they are about in accord, as a few days does not make much difference at that period.

By all the facts in the case I am induced to believe that it was only at that time that Lowden so met the defendant, although afterwards he says that it was between 6th and 12th May. It being so, I can understand that the defendant, having no more object in obtaining the possession of the pipe, consented to allow Lowden to retain possession of the same for his own use.

The testimony of Lowden is somewhat contradictory, and, on that account, I must take the evidence given by the defendant as giving the real facts and real dates. In no way is the defendant contradicted as to his visits to Jones in Dawson 3 times from 27th April to 3rd or 4th May, and his insistence about obtaining immediate possession of the pipe. Mr. Jones was here, and was not examined as a witness, and, therefore, that part of the evidence of the defendant has to be taken as representing the true facts.

Later on part of the pipe was found by the defendant to be in the possession of Wilson & Townsend. How it came into the possession of Wilson & Townsend we do not know exactly, though Lowden was asked to permit them to use them.

I am forced to admit that the fact of giving a consent to Lowden to continue using a portion of the pipe which he had, and the charging of $20 to Wilson and Townsend for the use of what they had, weakens, to a certain extent, the position of the defendant, as that shews that, even after the delays for delivery and at a time when, according to his own affirmation, they were of no more use to him, he still continued to hold himself as the proprietor thereof under the mortgage.

While this action was pending the plaintiff had the same goods seized and sold; there is an admission to that effect; and he recovered on the sale $300. In view of his negligence to have those goods which were under his control delivered at a proper time, I think that he was at fault, and that, the goods having been sold for his benefit, this action should be dismissed; I would say with costs if the defendant had not given that consent to Lowden and received the $20 from Wilson & Townsend; but, on that account, there will be no costs in his favour. Taking this view of the case, the counterclaim is also dismissed without costs.

THE

Western Law Reporter

VOL. VIII. TORONTO, AUGUST 1, 1908. No. 7.

MANITOBA.

MAY 20TH, 1908.

COURT OF APPEAL.

POLIQUIN v. ST. BONIFACE.

Vendor and Purchaser—Contract for Sale of Land—Action by Purchaser for Specific Performance—Acceptance of Lease by Purchaser from Vendor—Estoppel—Pleading.

Action for specific performance of an agreement by defendant to sell to plaintiff 4 Mission lots in St. Boniface.

The statement of claim alleged the contract of sale, the taking of possession by plaintiff, and making improvements.

The defences set up were: (1) general denial; (2) 'that if the plaintiff was at any time in possession of the lands, he was in possession only as tenant of the defendant under a lease in writing made between the defendant and the plaintiff;" (3) the 4th section of the Statute of Frauds.

At the trial before CAMERON, J., during the cross-examination of plaintiff, defendant's counsel produced a lease from defendant to plaintiff of certain lands, including the lots in question. The lease was dated some years subsequent to the alleged date of purchase and had expired before the commencement of the action.

The plaintiff admitted his signature to the lease, but said he was not able to read English, and that he was induced to sign the document by misrepresentation as to its nature.

At the conclusion of plaintiff's examination defendant's counsel submitted that the action must fail, and that plaintiff was estopped by reason of the lease.

CAMERON, J., held that the plaintiff was effectually concluded, so far as this action was concerned, and dismissed it with costs.

From that decision the plaintiff appealed.

A. B. Hudson and A. Anderson, for plaintiff.

G. A. Stewart Potts, for defendant.

THE COURT (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), held that the second defence did not amount to a plea of estoppel; and that, in any event, the lease having expired before the commencement of the action, there was no estoppel.

PHIPPEN, J.A., was of opinion that the existence of the lease was not necessarily inconsistent with the contract of sale, and, therefore, did not create an estoppel.

Appeal allowed and new trial granted. Costs of the trial and of the appeal to be costs to plaintiff in any event of the cause; the defendant to be allowed one week from entry of order to amend, and plaintiff one week thereafter to reply to the amendment.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

DAVIS v. O'BRIEN.

Building Contract—Action for Balance of Contract Price—Building not Completed according to Plans and Specifications—Trivial Details—Substantial Completion—Possession Taken by Defendant—Failure to Call Attention to Unfinished Parts—Waiver—Estoppel—Amendment.

The plaintiff sued the defendant for the balance of a contract price, agreed to be paid by the defendant to the

plaintiff, for building and completing a dwelling-house on the defendant's land. The contract and specifications were prepared by the plaintiff. There was no architect or other supervisor of the work. The first half of the contract price was to be paid when the roof was put on the building, and the second half on completion of the building.

The plaintiff purported to complete the building, and the defendant entered into possession. The first half of the contract price, and the greater part of the second half, were paid.

The action was brought to recover the balance. The trial Judge, CAMERON, J., gave judgment in the plaintiff's favour for that balance, and the defendant appealed.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

L. McMeans, for defendant.

F. L. Davis, for plaintiff.

PERDUE, J.A.:—The plaintiff sued for the balance due on a contract for the building of a house. The defence is that the plaintiff has not completed the work in accordance with the contract, that the defendant from time to time requested the completion of the house, but the plaintiff neglected and refused to do so.

At the trial Cameron, J., entered a verdict in favour of the plaintiff, holding that the contract had been substantially complied with.

The house was to be constructed according to plans and written specifications. It was built in the summer of 1905, and the defendant moved into it about 15th August of that year. Objection was made by the defendant that certain things were unfinished. The plaintiff did some further work on the house, but the defendant insisted that it was still left incomplete.

All the matters relied on by the defendant on this appeal as shewing that the house was still unfinished were the following:—

1. A "quarter-round" or piece of wood to be nailed around the baseboard in the kitchen and bath-room.
2. Beam-filling around the joists.
3. Flashing around the chimney.
4. Collar ties to the rafters.

5. That 6 of the storm windows had not received two coats of paint.

The defendant failed to establish his claim as to numbers 3 and 5. In regard to number 2, the specification was as follows: "The walls will have to be beam-filled or built in between the joists on the inside." The plaintiff adopted the second alternative and built in with bricks between the joists on the top of the foundation wall, making an inner wall between the joists of the thickness of a brick, and leaving a space between that and the outer wall. The defendant complains that his water pipes passed through this space, and, as it was shut off from the heat in the cellar, the pipes froze, and he had to tear out the bricks in order to get at the pipes. This was, no doubt, objectionable from the defendant's standpoint, but it appears to me that the plainiff was quite within his rights in acting as he did, and that in this respect he complied with the contract.

The other two objections were not raised until the trial of the action. The defendant was examined for discovery, and was asked to give particulars of what he asserted was incomplete. He gave a number of things as to which he complained, stating that these things comprised the work that was unfinished, but made no mention of these two items. They were a part of the work and were mentioned in the specifications. The plaintiff contends that they were overlooked, and no complaint was made in regard to them, until the trial of the action. According to the evidence produced by the defendant it would cost $2.75 to put in the "quarter-round" and $5 to put in the collar ties. The whole question therefore is, must the plaintiff fail in his action for the contract price by reason of his omission in respect of these two details?

The defendant had been in possession and occupation of the house for nearly 2 years before the commencement of the suit. He failed to establish that he had called the plaintiff's attention to these defects or had ever asked him to remedy them. He had taken the house off the plaintiff's hands, and, if he found any defect in its construction, or that it was incomplete under the contract, it was his duty to call the plaintiff's attention to the matter complained of so that it might be remedied. If he failed to do this and continued to live in the house so long a time without calling attention to the defects, he should,

in the case of matters as trivial as the present, be held to have waived them or acquiesced in them. Were it otherwise, an owner might refuse to pay the contract price of constructing an expensive house, and, where sued, escape payment by setting up some trivial defect which he had kept concealed until then.

As objections 1 and 4 were first raised at the trial, the plaintiff should be at liberty, if necessary, to set up waiver by the defendant.

I think the appeal should be dismissed.

HOWELL, C.J.A.:—The facts are set out in the judgments of my brother Judges, which I have read.

As to the beam-fillings; the provision in the specifications is that it is to be "beam-filled or built in between the joists on the inside." It certainly was built in between the joists on the inside, and there was no evidence that the work done was not the building in between the joists required by the specifications; the evidence of the defence simply went to the extent that this was not beam-filling.

The only other objections to the completion of the work are: 1st, the want of quarter-round at the floors; and 2nd, the failure to put on collar ties between the rafters.

Each of these alleged defects could be completed at any time, and would only cost together about $7. Even in the examination for discovery the defendant did not mention them, and during the years of controversy between the completion of the house as contended by the plaintiff, at which time the defendant entered into possession, and the commencement of this action, the defendant did not claim or assert that this portion of the work was not completed, and the plaintiff swears he did not know until the trial that these trifles had not been completed. If, after the claimed completion of a building and after the occupation thereof has begun, payment is disputed because the work is not completed, on grounds found untenable at the trial, the defendant should not be permitted to succeed because he has discovered some incomplete trifles which he did not mention before suit. It seems to me the laws were made for man with all his weaknesses and forgetfulness, and that a litigant should not hold back the knowledge that a bolt was not put on or a screw not driven

home, and thus succeed in litigation, when this defect was only mentioned after suit was brought.

There was a waiver of this work or an acquiescence in the non-performance of it which the plaintiff may now plead if necessary.

The appeal should be dismissed.

RICHARDS, J.A.:—The defendant's contention is that, in a number of respects, the house was not completed, and that the plaintiff had no claim to be paid the balance until those matters were made good.

Several of the objections were as to items not specified in the contract or specifications. As to those, I accept the decision of the trial Judge as final.

There were items mentioned in the specifications which the defendant contends were not done.

It seems to me only necessary, for the purpose of this appeal, to refer to one of them. The wording of the specifications as to it reads: "The walls will have to be beam-filled or built in between the joists on the outside." When the house was handed over, this item had not been complied with. Within a reasonable time the defendant complained of the omission. The plaintiff did not then beam-fill; but he caused one row of bricks to be built up above the inner side of the foundation wall, and from the top of that wall, between the joists, to the floor above. The inner row of bricks was 4 inches thick and left empty spaces between it and the outer wall of the house, which outer wall came down to the outer edge of the foundation wall. In putting in this skin of bricks, that part of the pipe, supplying water to the house, which was between the top of the foundation wall and the floor above, was enclosed in one of the vacant spaces between the skin of bricks and the outer wall. In cold weather this pipe repeatedly froze, being deprived by these bricks of the warmth from the cellar.

The plaintiff contends that the wording of the specification gave him a choice between beam-filling (which would have filled in all the spaces on top of the foundation wall, from the latter's inner edge to the outer wall of the house), and doing what he did; so that what he did was, he says, a compliance with the specification.

It seems to me that the "building in" which was contemplated by the specification was such a building in as

would fill up the spaces between the joists to the same extent as beam-filling would, and that the plaintiff, in refusing to do so, has not complied with the contract.

Where a contractor agrees to do certain specified work, to be paid for on completion, and he deliberately refuses to complete that work, he should not, in my view of the law, be allowed, at least during the continuance of such refusal, to recover for the part of the work that he has done, whether he sues on the contract or on a quantum meruit. The value of the part left undone, or its proportionate value to the portion that has been completed, of the contract work, seems to me to be immaterial—so long as it is a part which the contractor has distinctly agreed to perform. That seems specially applicable in a case like the present, where the contractor himself drew the specifications.

I have not seen any English or Canadian case which decides the contrary, as I read it. In Forman v. Liddesdale, [1900] A. C. 200, Lord Hobhouse, in delivering the judgment of the House of Lords, and in referring to an uncompleted contract, says: "The learned Judge mentions 4 matters in which they have failed. Two of them are apparently trivial, and such perhaps as would not by themselves have any greater effect than to give the defendants a cross-claim, if damaged by the variation. The other two are more important."

It may be suggested that the above is an authority in the plaintiff's favour in this action. But that case did not turn on the trivial failures; and I cannot see that such an obiter dictum should be taken as a statement of the law.

With great deference to the view taken by the learned trial Judge, I would allow the appeal.

PHIPPEN, J.A.:—This action is brought by a contractor to recover a balance of $362 alleged to be due under a contract between the parties for the erection of a dwelling house by the plaintiff for the defendant, and for $26.50 extras.

There is no dispute concerning the extras.

The statement of claim alleges that on 12th June, 1905, the plaintiff entered into a contract with the defendant to erect for the defendant a dwelling-house in the city of Winnipeg, according to certain plans and specifications dated 10th April, 1905, for the sum of $2,430, and that the plaintiff duly built and completed, in accordance with the said specifi-

cations, plans, and contract, said dwelling-house for the defendant, and the defendant accepted and entered into possession of the same.

The defence is that, while the plaintiff partly erected the house, he never completed the same as required by his contract; the defendant asserting that he is and always has been ready and willing to pay the plaintiff the balance owing on the contract when the plaintiff has completed the same.

The defendant contends that the house was not completed in respect of the following matters, each of which is distinctly called for in the specifications: 1st, the foundation was not filled in or built up between the beams; 2nd, no quarter-round has been put on the baseboards in the kitchen and bath-room; 3rd, no collar-ties have been placed on the rafters; 4th, certain of the double windows received one coat of paint only, instead of two coats as called for by the specifications.

There is some dispute as to the meaning of filling in or building up between the beams, referred to in the first objection. There is also a dispute of fact as to whether or not all of the double windows received two coats of paint. As neither of these items is material in amount, and as it is admitted by counsel for the plaintiff that the specifications have not been complied with in that the quarter-round and collar ties have not been placed as called for, the disputed items do not affect the disposition of the case, and I will not further consider them.

It is not alleged by the pleadings shewn by evidence that the defendant waived the strict performance of the contract or entered into any new agreement with the plaintiff entitling the plaintiff to recover without regard to the literal completion of the original contract. The action is based upon the allegation that the plaintiff has complied with all of the terms of the contract, plans, and specifications, and is entitled to receive payment of the sum claimed as the amount due thereunder.

This being so, it appears to me the case does not admit of argument. Whether the quarter-round and the collar ties constitute a substantial part of the contract is not open to discussion. In framing their agreement the parties deemed them of sufficient importance to specify them as works to be done by the plaintiff and to make the payment of the last

instalment, an amount greater than that now claimed, conditional on the contract being carried out in its entirety; a construction accepted by the plaintiff in preparing his statement of claim.

I think, on the admitted facts, the case is concluded by the decision in Brydon v. Lutes, 9 Man. L. R. 463. Chief Justice (then Mr. Justice) Killam, in delivering one of the judgments of the Court, says, at p. 470: "But if there is a distinct failure to comply with an express stipulation of the contract, although in a small matter, or if there is a substantial defect in work or material, the special contract remains open, and, unless there is acceptance or acquiescence such as will waive the objection or raise a new contract, how can there be an executed contract? I know of no English or Canadian decision which recognizes a difference in these respects between building contracts and contracts for the supply or for the repair or improvement of chattels. All the decisions which I have found, in which, notwithstanding defects, the defendant has been obliged to pay, have been in cases in which there have been some acts of acceptance or acquiescence."

Again at p. 471: "It appears to me to be absolutely against both principle and authority to admit the proposition that, where work is to be done in a specified manner, and to be paid for upon completion, and it is done in a different manner or so defectively as to justify an allowance for the defects, and where the party for whom it is done refuses to acquiesce in the variation or defects or to accept the work, but simply takes the position that the workman must perform it according to the express stipulations and perfectly, and interposes no obstacles to this being done, the workman can recover before this is done. What is the effect of a different conclusion? A builder, if he understands his business, can in ordinary contracts have the specifications clearly framed. In unusual cases he can insist upon an architect or skilled surveyor being appointed to determine moot points, and accept or reject his work as it proceeds. In small contracts, such as that now before us, where the owner does not desire an architect, and where the specifications are usual ones about which there need be no question, if there were variations or defects the owner would be placed in a most difficult situation. He must either accept

defective work or materials, or some change in detail which he does not desire, or he must estimate what should be a proper allowance, usually at the expense of getting an expert to value it, and then, if the builder differs or refuses any deduction, the owner would become involved in expensive litigation in which he would be at the mercy of the opinion of Judge or jury upon the question whether the difference was material or of the proper compensation, both matters of opinion only, with grave danger of having to pay all costs. It appears to me that the simplest plan is to say that the builder who contracts to build according to certain distinctly specified particulars should perform his contract before he should be entitled to say that the building is completed."

It was suggested on the argument that a construction of the contract holding the plaintiff strictly to the performance of minor details in his specifications might, in building contracts, in certain cases at least, work considerable hardship. In view of the decision in Brydon v. Lutes, I think this argument is not open to the plaintiff. It has, however, been dealt with by the Court of King's Bench in banc in Ontario in the case of Oldershaw v. Garner, 38 U. C. R. 37, where Chief Justice Harrison, delivering the judgment of the Court (p. 52), states: "The argument of hardship in a particular case is always a dangerous one to listen to; but in truth there is neither hardship nor injustice in the rule with its qualification; it holds men to their contracts; it admits, from circumstances, the substitution of new contracts; nor is there any hardship in the present case disclosed by the evidence; and a verdict for the plaintiff might work a greater hardship on the defendant compatibly with that evidence."

While in cases of hardship Courts may be astute to discover reasons for granting relief, it is not within their power, according to my understanding of the law, on the ground of hardship alone, to alter contracts by which parties have defined their rights.

The trial Judge found for the plaintiff, on the ground that the contract had been substantially performed. I cannot agree with his holding in so far as it involves the authority of the Court to disregard specific conditions which the

parties themselves have settled for the determination of their interests.

I regret that I am unable to concur with the judgment of the learned Chief Justice of Appeal. To repeat somewhat, neither waiver nor estoppel is pleaded. A careful perusal of the evidence fails to disclose that counsel either for the plaintiff or the defendant directed any evidence to either of these issues. No amendment of the pleadings was requested either at the trial or on appeal.

The evidence, such as it is, is all in favour of the defendant. From the plaintiff's own admissions the house was not completed according to the contract and specifications. The defendant never accepted the building. The plaintiff says (p. 6): "He found fault with pretty nearly everything and said it was a botch job from beginning to end." And at p. 8: "He found fault with everything." The plaintiff states he took a Mr. Jones to look over the building, and (p. 16) "Mr. O'Brien told me that I would never get the money until I tore that beam-filling out and put it in again. I asked him to enumerate what he wanted done and he wouldn't say. I don't know that I ever pressed him." The defendant says that he complained to the plaintiff of the absence of the quarter-round. This statement the plaintiff does not deny. The defendant was in the hospital for a month while the house was building, having had the misfortune to lose an eye.

Under these admitted facts, it would seem impossible, even with appropriate defences pleaded, to excuse the plaintiff from performance of the agreement on the ground of waiver or estoppel. Certainly, as the issue is framed, I must hold the rights of the parties to be governed by the terms of the agreement produced by the plaintiff as the foundation of his action. The judgment is governed by Brydon v. Lutes, and the appeal should be allowed with costs.

As the Court was divided, the appeal was dismissed without costs.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

REX v. CLEGG.

Criminal Law—Usury—Money Lenders Act—Loan—Rate of Interest — "Money Lender" — Practice of Lending Money at Usurious Rates—Evidence.

Reserved case.

The following case was stated by MYERS, Co. C.J., for the opinion of the Court, under an order of the Court dated 14th May, 1908, made pursuant to sec. 1016 of the Criminal Code, R. S. C. 1906 ch. 145:—

"The prisoner, Sarah Ann Clegg, was tried by me sitting as Judge in the County Court Judge's Criminal Court for the Eastern Judicial District of Manitoba, at Winnipeg, on 28th April, 1908, on an indictment as follows:—

"'Sarah Ann Clegg stands charged for that she, the said Sarah Ann Clegg, on or about 28th January, 1908, at the city of Winnipeg, in the said Eastern Judicial District of the province of Mantoba, being then a money lender, within the meaning of the Money Lenders Act, unlawfully lent to Hubert Weiss the sum of $35 on a contract or agreement, calling for the repayment of $56 by 20 weekly payments of $2.80 each, the first payment to be made on 1st February, 1908, thereby exacting a rate of interest greater than that authorized by the said Money Lenders Act.'

"Several documents were filed as exhibits, and the evidence of Hubert Weiss, William Charles Laird, and Detective Green, was given on behalf of the Crown, copies whereof are attached hereto or filed herewith.

"I found the prisoner guilty, but upon request for a reserved case by prisoner's counsel I did not sentence prisoner, as her counsel stated that he would appeal the case.

"The questions now stated for the consideration of the Court are:—

"1. Does the written contract made between Hubert Weiss and D. H. Tolman, dated 28th January, 1908, and

termed 'Assignment,' constitute a loan within the meaning of the Money Lenders Act, being ch. 122, R. S. C. 1906?

"2. Was the prisoner, Sarah Ann Clegg, a money lender as defined by the Money Lenders Act?

"3. Was the oral evidence admitted by me to explain the dealings between the accused and Hubert Weiss improperly admitted, although it may have placed a different signification upon the written contract termed 'Assignment' aforementioned.

"4. Was the accused, Sarah Ann Clegg, properly concivted of the offence charged in the indictment?"

E. J. McMurray, for the prisoner. To convict, a Judge must find that the accused was a money lender under the Act R. S. C. 1906 ch. 122. Section 2 defines a money lender, and so defines it that the Crown must prove the prisoner to be an habitual money lender at a rate higher than 10 per centum per annum. As to proving that the accused is an habitual money lender: Litchfield v. Dreyfus, 22 Times L. R. 385; Bellot on Bargains with Money Lenders, p. 85. The Crown have produced no evidence that the prisoner was an habitual money lender. The documents which represent this transaction must speak for themselves. Oral evidence is inadmissible: Addison on Contracts, 10th ed., p. 843. The contract is one of purchase and sale and not a loan. The purchaser is not bound in any event to obtain back the money which he paid. The purchaser bought an expectancy in the purchase of an unearned salary. The purchase here is similar to the purchase of an annuity, a bottomry bond, or a growing crop, or unearthed minerals. The purchase of an expectancy is not illegal: 29 Am. & Eng. Encyc. 453; Field v. City of New York, 6 N. Y. 179; Farrow v. Hubbard, 149 N. Y. 592. There is an expectancy here, and the contingency in the transaction alters its complexion, and shews that it was not a loan. To constitute usury, there must be a loan; in order to constitute a loan, the lender must be entitled to his money in any event. The purchaser in this transaction, in the event of the other party dying or not working, lost. No matter how unconscionable the transaction may be, unless there is a loan there can be no usury: Meaker v. Fiero, 145 N. Y. 165; Struthers v. Drexel, 122 U. S. R. 487; Seymour v. Marven, 11 Barb. 80. The purchaser cannot proceed against the estate of the deceased in the event of death.

In the case of a loan he could. If this transaction were a loan, there is no proof that it is at a rate of more than 12 per cent. per annum, for the prisoner did not know when the money would be repaid, and it might be less than 12 per cent. before it was paid. Section 6 of the Money Lenders Act defines the rate of interest and discount. This transaction, if it is not a straight purchase, is a discount merely, and sec. 11 of the statute does not apply, as that section applies to interest only. As to discount: 9 Am. & Eng. Encyc. 471.

George Patterson, for the Crown, admitted that there was no evidence that the prisoner lent money by practice at over 10 per cent.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

RICHARDS, J.A.:—It appears that there is no evidence that the accused made a practice of lending money at a higher rate than 10 per cent. per annum within sec. 2 of the Act. In all other respects the accused seems to me to come within the definition of a "money lender," and if such evidence had been given I should think the case fully proven and the conviction justifiable.

I would answer the questions as follows:—

(1) The contract and other documents and the facts shewn by the verbal testimony are evidence of a loan within the meaning of the Act.

(2) The prisoner is shewn to be a money lender in all respects, except that it has not been proved that she has made a practice of lending money at a higher rate than 10 per cent. per annum.

(3) No.

(4) No, because as above stated she is not shewn to have been a money lender within the Act.

Being of opinion that the ruling of the learned trial Judge was erroneous, we direct the accused to be discharged.

Prisoner discharged.

MANITOBA.

MACDONALD, J. JUNE 22ND, 1908.

TRIAL.

BATES v. CANNON.

Bankruptcy and Insolvency—Action by Assignee for Benefit of Creditors to Set aside Chattel Mortgage Made by Assignor—Insolvency—Past Indebtedness—Mortgage Valid as Respects Goods Exempt under sec. 29 of Executions Act.

Action to set aside, as fraudulent and void as against creditors, a chattel mortgage, dated 9th December, 1907, given by James Speed to the defendant, the action being brought by the plaintiff as the assignee of Speed under an assignment for the benefit of his creditors dated 16th January, 1908.

A. B. Hudson and J. B. Noble, for plaintiff.

S. H. McKay, for defendant.

MACDONALD, J.:—At the time of the giving of the chattel mortgage in question James Speed, the mortgagor, was in insolvent circumstances to the knowledge of the defendant. Speed in his evidence says that on 9th December, he was not able to pay his debts, and that the defendant knew it, and this is not contradicted.

The chattel mortgage was not given in consideration of any then present actual bona fide payment in money or by way of security for any then present actual bona fide advance of money, but was given for a past indebtedness, and under sec. 41 of the Assignments Act the chattel mortgage would be void as against the assignee.

It is urged on behalf of the plaintiff that the goods comprised in the chattel mortgage are exempt under sec. 29 of the Executions Act, and that, therefore, the mortgagor had the right to mortgage them, and his doing so did not affect the position of his creditors, as such goods would not be available in satisfaction of the debts of the mortgagor.

The chattel mortgage, however, comprises goods which are not, and could not be held to be, exemptions, and as to such goods the chattel mortgage would be void. An execution debtor can do as he pleases with the statutory exemptions: Field v. Hare, 22 A. R. 449.

The chattel mortgage would, therefore, in my opinion, be valid as to the goods which are, or could be, claimed by the debtor as exemptions.

At the time of the giving of the chattel mortgage the mortgagor declared that he would claim his exemptions. In his evidence he says the exemptions, meaning those to which he would be entitled, were included in the chattel mortgage. His business, at the time of giving the chattel mortgage, was that of a farmer, and he would be entitled to the exemptions of a debtor in that line of business. He had at the date of the chattel mortgage the right to do as he pleased with his exemptions with the exception of the horses, which are exempt only while used by the debtor in earning his living. They were so used by him at the date of the chattel mortgage, and would be, therefore, free from the charge of an execution and from seizure thereunder.

The defendant is entitled to a charge upon the goods which would be exempt, and as to the remaining goods the plaintiff is entitled. In the event of the plaintiff and defendant being unable to agree upon the goods to which each is entitled, I refer the matter to the local Master to adjust their differences.

There will be no costs to either party.

MANITOBA.

MACDONALD, J. JUNE 26TH, 1908.

TRIAL.

O'CONNOR v. PELTIER.

Landlord and Tenant — Distress—Sub-lease — Rights of Lessee against Sub-lessee, where no Reversionary Interest Reserved—Reversion by Estoppel—Right of Entry—Payment of Rent—Injunction — Damages — Costs.

Action for an injunction to restrain the defendant from making a sale of goods and for damages for wrongful distress.

J. F. Kilgour, for plaintiffs.

A. B. Hudson and J. B. Noble, for defendant.

MACDONALD, J.:—The defendant on 14th June, 1907, acquired a lease of certain premises in the city of Brandon for a term of 5 years from 17th June, 1907.

On the latter date the defendant made a lease to the plaintiffs for the full term of the lease held by him, at an advanced rental, and, the plaintiffs becoming in arrears for the payment of the rent reserved in their lease, the defendant issued a distress warrant and placed a bailiff in possession, who made a seizure of the stock in trade and other effects on the premises in the lease described, which seizure, it is contended by the plaintiffs, resulted in the business then carried on by them being closed. The plaintiffs, although admitting owing the defendant for 2 months' rent, and the payment by them to him of rent previously due, deny his right to make a seizure, and bring this action, claiming an injunction restraining a sale of the goods, and damages for wrongful distress.

The principal point of law involved is the effect of the defendant, by his lease to the plaintiffs, alienating all his estate and interest in the premises, reserving no reversionary interest.

"The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, and the reversion must be vested in him at the time of the distress:" Bell, p. 46; Stanley v. Allcock, 16 Q. B. 636. The right to distrain is an incident of the reversion, and, unless authorized by statute or express agreement, a distress can be lawfully made only when a reversion is vested in the person distraining: Bell, p. 260; Smith v. Torr, 3 F. & F. 505.

The lease from the defendant to the plaintiffs is, in effect, an assignment of all his interest in the premises, and this lease or assignment does not reserve to the defendant the right to distrain for rent, and there is no statutory authority here for such a proceeding.

The argument of Mr. Hudson is not that the ordinary contingent right of re-entry created a sufficient reversion to support a distress, but that such contingent right of re-entry,

together with the difference in the rent reserved and the absolute covenant to deliver up possession to the lessor at the end of the term, shewed an intention to create the relationship of landlord and tenant, and thus created a reversion by estoppel sufficient to support a distress. I cannot, however, agree with that proposition. A right of entry is not an estate, and the difference in rent reserved in the latter lease cannot affect the condition of the estate.

The case differs but little in its legal status from that of Parmenter v. Webber, 8 Taunt. 593. In that case the lessee of two farms agreed with A. that he should have them during the leases for the same, A. to remain tenant to the lessee during the leases. A. took possession and paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrears. Held, that this distress could not be supported, as the agreement operated as an absolute assignment of all the lessor's interest in the farms.

Nor does the payment of rent operate as an estoppel. In Hazeldene v. Heaton, Cab. & El. 40, Stephen, J., said: "The validity of the distress depended on whether the defendant had a reversion; that, in his opinion, he had none; the sending of a cheque was no attornment, for the payment of the money was only the carrying out of the contract between the parties."

I find that the defendant had no reversionary interest in the property in question, and that, therefore, his distress cannot be supported.

The plaintiffs claim damages as well as an injunction restraining the sale of the goods seized.

As to the claim for damages I find that there were none occasioned by the seizure. The plaintiffs were insolvent. They had closed up a portion of their business by reason of financial troubles. The electric lighting of their premises had been cut off because of their inability to pay, their employees had recovered judgments against them in the police court for non-payment of wages, and they were in arrears for rent due the defendant, and they had to mortgage their stock in trade and effects to pay the rent previously in arrears.

They were of the impression, as was also the defendant, that the right to distress existed, and, when a demand for the rent was made by the defendant, they intimated that they were unable to pay, and told him he might as well go on and seize for the arrears of rent, and they voluntarily gave up the keys of the premises before a seizure was made, in anticipation, however, of a seizure. And after the seizure one of the plaintiffs assisted in stock taking and a sale was delayed at the plaintiffs' request, in the hope of a private sale being effected. In the face of these facts, I cannot see how the plaintiffs can be entitled to damages. It appears from the evidence that after the seizure certain of the goods on the premises disappeared and are unaccounted for. Neither the defendant nor his agents have any knowledge of their removal, nor did they or either of them have any part directly or indirectly in their disappearance. These goods are valued by the plaintiffs at $250 or $300, although they say they did not check up the lost goods thoroughly. I think possibly that if their value was to be taken into consideration in this action, $75 to $100 would be nearer their value than the amount estimated by the plaintiffs.

After the defendant had placed his bailiff in possession, and locked the premises up, he found the chattel mortgagees in possession, having gained an entrance through the back of the premises. It is possible that the goods that disappeared can be accounted for through this improper proceeding. I cannot find the defendant responsible for this loss, but I reserve leave to the plaintiffs to bring any further action they deem advisable to recover the value of these goods, and I also reserve leave to the defendant to prosecute his claim for rent, which was abandoned on the trial upon that understanding.

The plaintiffs are, however, entitled to an injunction, and there will be judgment in their favour in accordance with the prayer of their statement of claim for such injunction, together with costs incident to that portion of their case.

MANITOBA.

MATHERS, J. JUNE 29TH, 1908.

CHAMBERS.

RE CROWN MUTUAL HAIL INSURANCE CO.

Company—Winding-up—Claim against Assets—Solicitor's Bill—Services Rendered in Procuring Incorporation — Services Rendered after Incorporation—Taking Benefit of Services—Validity of Assessment to Pay for Services —Reserve Fund.

Application by the Attorney-General, at whose instance the company were being wound-up, for a direction to the receiver appointed under sec. 42 of the company's Act of incorporation, to disallow, as a claim against the company, a solicitor's bill for fees, charges, and disbursements, amounting to $838.

R. B. Graham, for the Attorney-General.

W. R. Mulock, K.C., for the receiver.

G. D. Minty, for the solicitor.

MATHERS, J.:—The company were incorporated by a private Act of the legislature passed in the year 1904, ch. 69.

The bill of costs objected to is partly for services rendered in drawing the Act of incorporation and promoting its passage through the legislature, partly for services rendered in securing the passage of an Act amending the Act of incorporation, and partly for services rendered to the company after organization.

In the bill as rendered the disbursements, amounting to $284.95, are itemized, and the services rendered in securing the passage of the Acts mentioned are stated in detail, but only a lump sum of $750 is charged for fees, making the total bill in connection with the two Acts $1,034.95, an amount which is further lumped at $1,000. A separate bill is rendered for the services subsequent to the passage of the second Act, amounting to $88, making the total original claim $1,088. Upon this bill $250 was paid, leaving the net balance $838 still unpaid.

The Act of incorporation does not provide that the costs and expenses of obtaining the Act and preparatory thereto shall be paid by the company. It is usual to insert such a clause in all private Acts incorporating companies in England, but I am not aware that the practice has been general in this country. I am clearly of opinion that without such a provision in the Act or charter of incorporation a company are not liable for the expenses of procuring incorporation, unless after incorporation they agree to pay them.

The law is thus stated in Hamilton's Company Law, p. 69: "A promoter cannot claim from the company he promotes any payment for his services or expenses in promoting it, unless, in the case of a company incorporated by special Act or charter, the Act or charter so provides, or unless the company, after its incorporation, agrees with him to make such payment, or, semble, takes the benefit of his services or expenditure."

That statement of the law is supported by abundance of authority: Lindley on Companies, p. 196; Healy on Companies, p. 557.

Even where the articles of association provided that all expenses incurred about the formation of the company should be paid by the company, the solicitor's bill for procuring the incorporation is not a charge against the company for which the solicitor can rank in winding-up proceedings: In re Rotherham Alum and Chemical Co., 25 Ch. D. 103. Such a provision in an Act of incorporation would give the solicitor a direct claim against the company: Tilson v. Warwick Gas Light Co., 4 B. & C. 962, and Hitchins v. Kilkenny R. W. Co., 9 C. B. 536. The reason for the distinction, as pointed out in In re Rotherham Alum and Chemical Co., 25 Ch. D. 103, is that Parliament may enable the solicitor to sue the company, but the provision in the articles of association cannot, as they do not constitute a contract between the company and an outsider. It the solicitor was acting on the retainer of some person else, who was promoting the company, he would have no direct claim against the company, even if the Act contained the usual provision: Wyatt v. Metropolitan Board of Works, 11 C. B. N. S. 744; In re Skegness and St. Leonard's Tramways Co., 41 Ch. D. 215.

It was argued that the solicitor would have an equitable claim against the company, on the ground that they had taken the benefit of the solicitor's work, and Brice on Ultra

Vires, p. 770, was cited in support of that contention. Several of the earlier English cases seem to hint at some such right, but in the recent case of In re English and Colonial Produce Co., [1906] 2 Ch. 435, Vaughan Williams and Romer, L.JJ., expressly dissent from that view, and hold that the fact that a company adopts and takes the benefit of services rendered under a contract entered into before the formation does not make the company liable in equity to pay for those services. That was a case of a solicitor's bill which was partly for services rendered in procuring the incorporation of the company. There, as in the case before me, the company had made a payment on account, and the Court allowed the solicitors to appropriate the amount so paid to their pre-incorporation charges. Buckley, J., before whom the matter first came, allowed the solicitors the registration fee paid by them, because sec. 17 of the Companies Act, 1862, says: "There shall be paid to the registrar by a company having a capital divided into shares" certain fees, and he held that under that and a subsequent Act of Parliament the company became liable to pay the fees on registration. I was, however, referred to no provision in this province imposing a corresponding liability upon a company here, and I have found none. I cannot, therefore, hold that such liability exists.

It was further argued that, even if the solicitor's bill does constitute a claim against the company, an assessment could not be made to pay it, as, by sec. 28, "the amount to be assessed shall be the estimated sum necessary to pay all losses incurred during the crop season and all expenses of the company for the whole of the year," and that the money in the receiver's hands cannot be used for that purpose, as it must have been derived from assessments. Counsel for the solicitor admitted that an assessment could not be made to pay this claim, but pointed out that sec. 32 provides for a reserve fund "to consist of all moneys which shall remain on hand at the end of each year after payment of the ordinary expenses and losses of the company," and that "such reserve fund may from time to time be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year." I think, in the absence of anything to the contrary, I must assume that the money in hand does constitute such reserve fund and is available to pay such

portion of the solicitor's bill as constitutes a claim against the company. As this is a claim for which an assessment cannot be made, I think those creditors for the payment of whose claims an assessment can be made, should be compelled, in the first place, to have recourse to that method of payment so as to leave the reserve fund as far as possible available to pay the solicitor's bill.

As the company might have paid the solicitor's pre-incorporation costs: Gore-Brown on Companies, 119; I think they should not be permitted to appropriate the $250 already paid to such costs, as was done in In re English and Colonial Produce Co., [1906] 2 Ch. 435.

It will be referred to the senior taxing officer to ascertain what portion of the solicitor's bill is for services subsequent to incorporation of the company. The assessment already made will stand, and the money received from it will be applied first in payment of the claims against the company other than the solicitor's bill in question. After such application many remaining debts, including the amount found due to the solicitor by the taxing officer, will rank pro rata on the reserve fund, after payment of the receiver's costs.

The receiver will have the costs of this application out of the fund, and the solicitor's costs may be added to their claim.

MANITOBA.

MATHERS, J. JUNE 29TH, 1908.

TRIAL.

POTTS v. IMPERIAL BANK OF CANADA.

Bankruptcy and Insolvency—Assignment of Shares — Assignments Act—Seizure under Execution—Assignment Void as against Execution Creditors—Interpleader Issue.

Interpleader issue directed to try the question of the ownership of 1,300 shares, of the value of $10 each, in the Royal Manufacturing Co., standing, at the time of the seizure by the sheriff, in the name of one C. S. Whitworth, against whom the bank (defendants in the issue) had recovered judgment and issued the execution under which the

sheriff seized. Potts, the plaintiff in the issue, claimed the shares under an assignment from Whitworth.

A. Haggart, K.C., for plaintiff.

J. B. Coyne, for defendants.

MATHERS, J.:—The Imperial Bank recovered a judgment against Whitworth on 11th February, 1908, for $2,047.40, and on that day issued and placed an execution in the hands of the sheriff of the eastern judicial district, under which the sheriff, in the manner provided by the Judgments Act, seized the shares mentioned.

The judgment of the bank was recovered upon a note for $2,000 made by Whitworth to one Helgesen, and indorsed by Helgesen to the bank.

It is stated that at the time this note was made, Whitworth transferred the said shares to Helgesen as a collateral security, but no transfer was entered in the books of the company, and the shares stand there in the name of Whitworth. When the note was indorsed to the bank, apparently the bank had no notice that the shares were held as collateral to it, if such be the fact; but, whether or not that be the fact, unquestionably the equity of redemption in the shares still remained in Whitworth.

The plainiff Potts, who is a practising barrister, had been retained by Whitworth in connection with some litigation with Helgesen, and had begun an action in the name of Whitworth, on behalf of himself and other shareholders in the company, against Helgesen to have him declared a trustee of certain property for the company, but nothing further was done than to issue and serve the statement of claim. The plaintiff also acted for Whitworth in the action in which the Imperial Bank recovered judgment.

In that latter action a defence was entered for Whitworth, but, upon an application to the Referee, the defence was struck out and the bank given leave to sign judgment.

On 10th February, 1908, Whitworth, by an agreement in writing, purported to transfer all his right, title, and interest in the said shares to Potts, the plaintiff. The agreement is as follows:—

This agreement made this 10th day of February, 1908, between Charles S. Whitworth, of the city of Winnipeg, accountant, of the first part, and George Alexander Stewart Potts, of the same place, barrister-at-law, of the second part:—

"Whereas the party of the first part is the owner of 1,300 shares in the capital stock of the Royal Manufacturing Company, Limited, of the par value of $13,000, which said shares have been delivered to one H. T. Helgesen, of the city of Regina, province of Saskatchewan, as security for the sum of $2,000 with interest, upon an agreement that the said H. T. Helgesen would renew and save harmless the said party of the first part with respect to the promissory note for the sum of $2,000 held by the Imperial Bank of Canada:—

"And whereas the said H. T. Helgesen has defaulted in his said agreement, and the Imperial Bank of Canada has taken legal proceedings upon the said promissory note for $2,000 for the purpose of collecting the same from the party of the first part:—

"And whereas the party of the first part is involved in litigation with the said H. T. Helgesen with respect to the matters appertaining to the said the Royal Manufacturing Company, Limited, and proposes further litigation with respect to the breach of contract against the said H. T. Helgesen:—

"And whereas the said party of the first part is indebted to the party of the second part in the sum of $500, and is desirous of securing same to the party of the second part, together with the further sum of $2,000, for the purpose of enabling the party of the second part to carry on the litigation hereinbefore mentioned, and, for the purpose of so securing the party of the second part, has agreed to give and grant to the party of the second part a lien and charge upon the aforesaid 1,300 shares of stock in the Royal Manufacturing Company, Limited, subject only to any claim or charge upon the same which may exist in favour of the said H. T. Helgesen:—

"Now, therefore, this agreement witnesseth that, in consideration of the premises and of the sum of $1 now paid by the party of the second part to the party of the first part, the party of the first part hereby assigns, transfers, and sets over to the party of the second part, all his right, title, interest, and claim to the aforesaid 1,300 shares of the stock in the Royal Manufacturing Company, Limited, to have, hold, and enjoy the same and the proceeds and earnings and dividends and profits thereof for the use and benefit of the said party of the second part until the said party of the second part shall have realized and received therefrom the full sum of $2,500, thereafter to be held in trust to be

transferred and assigned, as the party of the first part, his executors, administrators, or assigns may direct:—

"And the party of the first part covenants and agrees that he will pay the party of the second part the said sum of $2,000:—

"And the party of the second part agrees and covenants that upon payment of the said moneys and the execution of this agreement, he will release the party of the first part from all further claims and demands in respect of the said litigation.

"Witness," &c.

The plaintiff claims the ownership of the shares under this agreement, subject to the claims thereon of Helgesen, and denies the right of the execution creditors, the Imperial Bank, to have the shares sold under their writ of execution.

It was argued that the Imperial Bank have already got these shares, as they were transferred to Helgesen as collateral security to the note on which the bank have recovered their judgment. The recital, however, in the agreement does not so state. It would appear from the recital that the shares were transferred to Helgesen upon a promise that he would renew the note and indemnify Whitworth against it. This is not the same thing as giving the shares as collateral security to the note. But, even if the bank did hold the shares as collateral security, the defendant Whitworth has an equity of redemption which the bank have the right to seize and sell under their execution, but for the assignment to the plaintiff Potts.

The evidence makes it very clear that at the time Whitworth executed this agreement to Potts, he had no other assets with which to pay the bank's claim against him. He was therefore insolvent. The assignment is attacked on the ground that it is fraudulent as against the execution creditors. I think it is clearly void as against the bank under secs. 38 to 42 of the Assignments Act, and that it does not come within the provisions of the saving section 44.

There will be judgment againt the claimant, the plaintiff in the issue, declaring that he was not, at the time of the seizure, the owner of the shares in question as against the execution creditors, the Imperial Bank.

The Imperial Bank are entitled to the costs of the interpleader application and of the issue and trial thereof against the claimant.

MANITOBA.

MATHERS, J. JUNE 29TH, 1908.

TRIAL.

FREDKIN v. GLINES.

Emblements—Sale of Growing Hay to be Severed by Purchaser—Interest in Land or Chattels—Breach of Implied Warranty of Title—Damages.

On 12th July, 1907, the defendants sold to the plaintiff the hay growing on the south-east quarter of section 14-12-2 east, in Manitoba, for $110.

It was within the contemplation of the parties that the plaintiff should enter upon the land and cut and remove the hay. This the plaintiff proceeded to do, and, after he had a considerable quantity of the hay cut and a small quantity removed, he was notified to desist by a man named Bonner, who claimed to be the owner of the hay. As the plaintiff did not immediately comply, criminal proceedings for stealing the hay were instituted against him by Bonner. He then consulted his solicitor, who had an interview with Mr. Stewart, the vice-president and manager of the defendant company. Mr. Stewart admitted that there was a mistake about the right to the hay, and said that he would see Bonner and explain matters, and that the plaintiff had better vacate the land and not take any more hay. The plaintiff withdrew from the land and abandoned the hay, and the criminal proceedings were dropped. The defendants tendered the plaintiff a return of the $110 he had paid, but the plaintiff refused it and began this action for damages for a breach of warranty of title.

A. B. Hudson and W. D. Lawrence, for plaintiff.

C. P. Wilson and G. W. Jameson, for defendant.

MATHERS, J.:—The defendants did not own the land, but after the plaintiff applied to them for the right to cut the hay upon it they bought the right from one Stanley, whom they believed to have the right to sell it to them.

I find that the defendants acted as principals in selling the hay privilege to the plaintiff, and that in doing so they acted in good faith, believing they had a good title to it.

I find that the defendants admitted to the plaintiff that they had no title to the hay at the time they sold it to him, and that he, at their request, abandoned it to the claimant, Bonner. I think the defendants are estopped from now asserting that they had a good title and therefore conferred a good title on the plaintiff.

The question turns upon whether the transaction amounted to a sale of the goods or of an interest in land. There was no express warranty of title, and if what was sold was an interest in land, there would be no implied warranty of title. On the other hand, if the transaction was a sale of goods, there would be, under sec. 14 of the Sale of Goods Act, an implied covenant on the part of the defendants that they had a right to sell the hay, and also an implied warranty that the plaintiff should have quiet possession. Under secs. 13 and 52 the plaintiff had the right to treat the breach of the condition as to title as a breach of warranty and to sue for unliquidated damages; Benjamin on Sale, p. 598.

Prior to the Sale of Goods Act there is no doubt that a sale of fructus naturales, such as growing hay, was a sale of an interest in land: Crosby v. Wadsworth, 6 East 602; Carrington v. Roots, 2 M. & W. 248; and Jones v. Flint, 10 A. & E. 755. If in the case of a sale of standing timber, the contract provided for its removal by the buyer as soon as possible, the agreement would not be a contract for the sale of land but of goods: Marshall v. Green, 1 C. P. D. 35.

In the case at bar there was nothing said as to when the hay was to be cut or removed, so that I cannot hold that it comes within the apparent exception engrafted upon the common law doctrine by Marshall v. Green.

The Sale of Goods Act, sec. 2 (h), says: "The expression 'goods' includes all chattels personal other than things in action and money; the term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

It does seem to me that this is more than a mere codification of the common law. In Smith v. Surman, 9 B. & C. 561, it has been decided that a sale of timber which was standing at the time of the bargain, but which was to be felled by the vendor and paid for by the purchaser at so much per foot, was not within the 4th section, but within the 17th section, of the Statute of Frauds—in short, that it was a sale of the produce of the trees when they should be

cut down and severed from the freehold. Then came Marshall v. Green, supra, which appears to have gone further than any prior case, but even in that case the judgment went largely on the fact that the trees were to be removed "as soon as possible." The Act, however, imposes no time limit for severance, the only limitation being that that which was sold should be severed in performance of the contract, either by the buyer or seller. In the present case the parties certainly contemplated a severance of the hay by the plaintiff, so that, in the words of the Act, the hay was to be severed "under the contract of sale."

The only discussion I have been able to find on this section of the Act is in Benjamin on Sale at p. 190. The author there expresses the opinion that the concluding words of this sub-section have effected a change in the law. He says: "This enactment seems equivalent to declaring that under a contract of sale things attached to or forming part of the land, whether the property is to pass to the buyer before or after severance, are to be deemed goods, If this construction be correct, the enactment has removed all doubt with regard to fixtures, and has certainly altered the law with regard to buildings sold as materials and with regard to fructus naturales. If the parties to a contract of sale agree that such things shall be severed, they thereby become 'goods.' The conversion, by mere agreement of the parties, of an hereditament into chattels, which was repudiated by Chitty, J., in Lovery v. Pursell, 39 Ch. D. 508, has thus received legislative sanction. If this view be sound, that case, as well as Crosby v. Wadsworth and similar cases, can no longer be regarded as law."

The case of Slingerland v. Massey, 10 Man. L. R. 21, does not touch this case. All that case decided was that the natural product of the wife's land came under the description of issues and profits of her separate estate, and could not be taken under a writ of fieri facias de bonis issued against her husband.

I find that the defendants are liable for a breach of warranty of their title to the hay in question, and that the plaintiff is entitled to recover against them damages for such breach.

It was agreed between counsel that, if I should find the defendants liable, there should be a reference to the Master to assess the damages.

There will be a reference to the Master for that purpose.

The plaintiff is entitled to the costs up to and including the trial. Further directions and costs of reference are reserved.

MANITOBA.

JUNE 8TH, 1908.

COURT OF APPEAL.

ELVIN v. CLOUGH.

Principal and Agent—Agent's Commission on Sale of Land —Contract for Payment of Commission—Vendor and Purchaser Brought together by Agent's Procurement—Evidence,

Appeal by defendant from judgment of MACDONALD, J., 7 W. L. R. 762.

T. L. Metcalfe and D. A. Stacpoole, for defendant.

W. F. Hull and A. B. McAllister, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PHIPPEN, J.A.:—Adopting the findings of the learned trial Judge, the facts are shortly as follows. On 25th March, 1907, the defendant placed an hotel property with the plaintiffs, who are real estate agents, for sale by them under a written contract, the material terms of which are as follows: "You are hereby authorized to sell the property described below for the price and terms stated below or for such price and terms as I may agree to. I agree to pay you a commission . . . . on any sale effected directly or indirectly by you and approved by me . . . . I agree to notify you immediately a sale has been made . . . ."

Then follows a description of the property and the terms, which were, shortly, that the defendant would accept $8,000 as the smallest cash payment, and a mortgage for the balance, with interest at 6 per cent. per annum.

Shortly thereafter the plaintiffs introduced the property to one Forrest, who opened negotiations with the defendant for its purchase.

Forrest concealed from the defendant the fact that the plaintiffs had been instrumental in his becoming acquainted with the property, and, as an inducement to the defendant to modify his terms, represented that a sale to him would not involve the payment of a commission. This the defendant believed. The circumstances were not such as to put the defendant upon inquiry as to the plaintiffs, thus distinguishing the present case from Lloyd v. Mathews, 51 N. Y. 125. Believing that no commission would be payable, the defendant closed with Forrest, on terms less favourable to himself than those stated in his contract with the plaintiffs. The plaintiffs, subsequently becoming aware of the sale, brought this action to recover their commission as earned under the contract.

It was argued that the introduction of the property to Forrest, followed by the subsequent sale, was in fact a sale indirectly effected by the plaintiffs within the terms of the agreement. I have no doubt that had the defendant sold with knowledge that the property had been introduced to Forrest by the plaintiffs, he would be liable for some commission. I cannot, however, hold that the mere introduction of the property to Forrest without endeavouring to negotiate or in fact negotiating a sale is itself an earning of the agreed commission, the owner effecting a sale on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiffs' action, and under circumstances which did not place him upon inquiry.

Not having earned their commission within the terms of the contract, are plaintiffs entitled to recover for services rendered by way of quantum meruit? In Cathcart v. Bacon, 49 N. W. Repr. 331, it was held that under circumstances exactly corresponding with those in the present case, the plaintiffs were not entitled to recover. In delivering judgment in appeal Vanderburgh, J., says: "The plaintiff claims to be entitled to his regular commissions as a real estate broker for procuring the purchaser. The action was dismissed upon his own evidence, and we think properly. The defendant was at liberty to sell the property himself. He had no knowledge of the instrumentality of the plaintiff in the premises, and dealt with the purchaser as an original

applicant in good faith, and made new terms of sale. It does not appear that Maxfield was at any time willing to pay $40,000 in money, and plaintiff was not authorized to make any other terms. He is not therefore shewn to have procured a purchaser ready and willing to buy at the terms stipulated. Several months had elapsed, and there was nothing to put defendant upon inquiry in respect to plaintiff's alleged agency in the matter of inducing Maxfield to buy. Plaintiff did not therefore fulfil the terms of the contract of agency, nor are they shewn to have been waived. Maxfield was not presented by the plaintiff as a customer procured by him, and defendant did not accept plaintiff's services as the basis of subsequent negotiations, and thereupon voluntarily modify the terms previously given; and there is no evidence of any bad faith or attempt to evade his responsibility to the agent. There was no waiver of the terms of plaintiff's agency, and the defendant cannot be bound by supposed obligations, in ignorance of the facts upon which they are based."

This case was subsequently considered by the same Court in the case of Quist v. Goodfellow, 110 N. W. Repr. 65, when the Court, in a carefully reasoned judgment, adopted and re-affirmed their previous decision.

In Wolf v. Tait, 4 Man. L. R. 59, Mr. Justice Killam, in delivering the judgment of the Court of King's Bench in banc, says at p. 68: "It is quite clear upon these authorities that the defendant might have refused to accept Calloway as a purchaser when produced by Wolf, as he would not purchase on the prescribed terms; and there would then have been no liability for commission. He might then have revoked the plaintiff's authority to sell, and he might, subsequently, if acting quite independently and in good faith, have negotiated with Calloway directly or through another agent without rendering himself liable to the plaintiff. But upon the plaintiff's evidence he did not do this, he accepted the benefit of the plaintiff's efforts, and without revoking the plaintiff's authority he dealt with Calloway, so far as the plaintiff could know, whatever may have been his own mental intention, as the party produced by the plaintiff under the authority given to the plaintiff. He would thus ratify and accept any variation in the terms of Wolf's employment, just as the agent in Toppin v. Healey, 11 W. R. 466, accepted the variation in the terms prescribed by his employer."

It appears to me that the law is exactly as stated in these cases. An agent suing for his commission, in order to succeed, must shew that he has fulfilled the contract on which his claim is based.

If, however, the owner himself negotiates with an intending purchaser, introduced by the agent, the law presumes, in the absence of facts establishing a contrary conclusion, that he adopted the labour of his agent, varying the terms to suit his own convenience. It presumes a contract to pay a commission based upon the amount realized by the sale effected, regard being had to the relative value of the assistance given by the agent as compared with that which he was bound to give to earn his commission under the original agreement.

If, however, the agent has not done that which entitles him to commission under the terms of the agreement, no new contract is implied where the owner has himself sold in ignorance of the assistance rendered by the agent, and under circumstances which did not put him on inquiry, in any event (and this is all that is necessary to determine in the present case), where the sale was effected on terms less advantageous to the owner than those contemplated in the original agency.

The plaintiffs' counsel contended that the present case comes within the decision of Mansell v. Clements, L. R. 9 C. P. 139. I do not think so. In the Mansell case the purchaser's attention was first called to the property by a card on the premises. He endeavoured, but at that moment was unable, to obtain an inspection. He then concluded that the property could not be purchased for the amount he was willing to pay, and dismissed its further consideration from his mind. Later he was again introduced to the property by the plaintiffs, who were the defendant's agents entitled under the terms of their contract to a commission if the property was sold to a person introduced by them, and from information then obtained as to price and terms he again considered the property as a possible purchase. The plaintiffs then gave the purchaser a card to view the premises. The owner, with knowledge of this introduction, negotiated a sale on different terms. Under these circumstances it was held that the plaintiffs were entitled to recover. Accepting the facts as stated, the purchaser was introduced to the property, to the knowledge of the owner, by the plaintiffs. That

he had previously seen the property and knew it was for sale, he having as a fact determined not to consider its purchase, did not alter the character or value of what the agents did, did not make it less an introduction to the purchaser. The bringing the property to the purchaser's attention with knowledge of the terms of such was in effect a new introduction, and was in fact that introduction which subsequently led to its purchase. Under these circumstances, it appears to me that the plaintiffs were clearly entitled to their commission; as fully as if the purchaser was without knowledge of the property when it was brought to his attention by the agents.

Another case referred to by the plaintiffs, and one which, to my mind, more closely resembles the present, is Green v. Bartlett, 14 C. B. N. S. 681. In that case, however, although it is not definitely so stated, I gather that the owner was aware that the plaintiff was the means of introducing the purchaser to the property, and that in cancelling his agency, on the alleged ground that he had concluded to withdraw the property from sale, at the same time himself negotiating a sale with the plaintiff's purchaser, he acted in bad faith, and would not be heard to set up his cancellation as an excuse for not paying a commission.

In my opinion the appeal should be allowed and the action dismissed with costs.

MANITOBA.

MATHERS, J. JUNE 29TH, 1908.

TRIAL.

BENT v. ARROWHEAD LUMBER CO.

Principal and Agent—Agent's Commission on Sale of Land —Contract for Payment of Commission—Vendor and Purchaser Brought together by Agent's Procurement—Evidence—Remuneration of Agent—Quantum Meruit.

Action by a real estate agent residing in Chicago against the Arrowhead Lumber Co., incorporated under the laws of

British Columbia, and Thomas Meredith, president of the company, for commission or remuneration for procuring a purchaser for the company's property, consisting of a saw-mill and timber limits near Arrowhead, in British Columbia

A. C. Galt, for plaintiff.

C. P. Wilson, H. A. Robson, and C. P. Fullerton, for defendants.

MATHERS, J.:—The statement of claim alleges that early in the year 1906 the defendant company authorized the plaintiff to procure a purchaser for the company's property, and agreed that if he should find a purchaser satisfactory to the defendants the defendants would pay the plaintiff a commission of $50,000 on the sale. It further alleges that the plaintiff procured one Chauncey R. Lamb to offer to become purchaser of the property, and the defendants accepted Lamb as purchaser, and subsequently, about the month of August, 1906, Lamb caused a company to be incorporated under the name of the Lamb-Watson Lumber Company Ltd., consisting of Lamb and others, for the purpose of taking over the defendants' property, and, by the direction of Lamb, the property was, on or about 1st September, 1906, conveyed by the defendants to the Lamb-Watson Lumber Company, in consideration of the payment of $620,000, or thereabouts.

It is further alleged that the plaintiff has requested payment from the defendants of the amount agreed upon as his commission, but the defendants have refused to pay.

It is alleged by way of alternative claim that the plaintiff, at the defendants' request, expended much time and trouble and money in procuring a purchaser for the defendants' property; that the plaintiff succeeded in securing Chauncey R. Lamb as a purchaser for the property, and Lamb was accepted by the defendants, and afterwards, by the direction of Lamb, the property was conveyed to a company expressly incorporated for the purpose of taking over said property; and $50,000 is claimed.

By their defence the company deny that the plaintiff was authorized or requested to procure a purchaser on any terms, or that the plaintiff did procure a purchaser for the defendants' property, or do any work for the defendants. It further alleges that, if any authority was given the plaintiff,

it was terminated before the plaintiff performed any act, and if the plaintiff continued to interest himself after such termination, it was a wholly voluntary act on his part and without any authority.

It is further alleged that, if ever there was a contract between the plaintiff and the defendants, the condition which the plaintiff was to bring about in order to be entitled to reward was never brought about by the plaintiff and never existed.

The plaintiff in the year 1904 had some negotiations for the sale of this property for the defendant company. His negotiations fell through, but he retained the company's prospectus and some other data relating to their property. In January or February of 1906, one Peck, also of Chicago, who deals in timber limits as agent, had an interview with the plaintiff with respect to this property, and received from him the prospectus and other data which had remained in plaintiff's possession since the previous negotiations in 1904. The plaintiff then came to Winnipeg to find out if the property was still in the market, and, if so, the terms and price. He had interviews with the defendant Meredith, at Yorkton, Manitoba, at Winnipeg, and afterwards at St. Paul, Minnesota. Meredith told him the property was still in the market and that the company had decided to sell. He said if the plaintiff sold for $550,000 that they would pay him a commission of $50,000. This was at Winnipeg about the beginning of April, 1906. A day or two afterwards the plaintiff and Meredith again met in St. Paul, and again discussed the company's property. The plaintiff there asked Meredith for an option, but Meredith replied that he would not give him, or any one else, an option, because it would tie up the property. The plaintiff then asked what loading the property would stand, and was told that the company would not stand for any loading above the $550,000. The conversation in St. Paul is summarized by the defendant Meredith in his examination for discovery, as follows: "I said if he brought the people there to Arrowhead and they purchased the property we would name the proposition $550,000, and protect him to the extent of $50,000, provided he got the $550,000, but our price was $500,000 net, and any cut he might make—any amount he should reduce it—why of course he would lose it, but we had to have $500,000."

The plaintiff then returned to Chicago and gave Peck the information he had obtained from Meredith, and shewed him a photograph which he had obtained of the mill. Peck in the meantime had been in communication with Chauncey R. Lamb. On 7th May Peck had an interview with Lamb in Chicago, and gave him a description of the property, the name of the owner, and where those in control were to be found.

On the same day Lamb wrote Peck a letter saying: "The matter of purchase of timber deal in British Columbia presented to me by you in detail to-day is of interest to us, and, as soon as I am able to find my Coast representative, who is now investigating a deal in Western British Columbia, I will send him to investigate your proposition on the ground and report to me. Hope to have him there within a week. In the meantime if possible hold the matter open."

On 10th May Lamb wired to Peck: "Am investigating Canadian deal through friend in Winnipeg. Owners will not know me in deal until proper time. Will protect you."

On 11th May Lamb wrote to Peck: "As I wired you, I have taken up Canadian deal with a friend in Winnipeg who I find is personally acquainted with Mr. Meredith. I did this with the idea that this mutual friend could get him interested in us and make him understand that we are prospective purchasers and not fooling with the thing. I wish you would indicate to me what you expect in the way of commission."

In reply to that letter Peck wrote to Lamb a letter dated at Chicago on 14th May, saying in part: "I know that you have taken up the Canadian timber matter in order to get more directly at the owners, and I presume it is all right to do so. At the same time, as I told you, the owners are very anxious that it should not be known that they contemplated a sale, and it occurs to me that if the matter were not brought to them through the same parties who brought it to me, they might hesitate to negotiate. However, I hope this will not be the case. I would suggest that you mention the name of Francis S. Bent, of this city, as having introduced the matter to you, as he is the party who brought it to me. He is well known in Winnipeg in connection with Canadian lands. I was placed in direct connection with Mr. Bent through other parties. I would be glad if you would let me know what you hear of the property through your friend in Winnipeg. Mr.

Bent expects to leave for Winnipeg in a day or two, and it might be well for me to arrange, if possible, to have him see you in Minneapolis on his way through."

He then mentions that he would expect a commission of 10 per cent. He adds as a postscript that Mr. Bent will call upon him (Lamb) in Minneapolis that week on his way to Winnipeg, and "that it would be advisable for him to know the name of your friend in Winnipeg whom you have asked to see Meredith."

On 14th May Bent wired to Meredith: "Lamb of Minneapolis is interested in timber. Means business. He advises, is making inquiries of you through Winnipeg friend of yours. Make him price five-fifty. Answer." This telegram was sent to Winnipeg, but in the meantime Meredith had gone to Victoria, B. C., and it was repeated to and delivered to him there.

In the meantime Lamb had instituted inquiries in Winnipeg through Watson, who was associated with him. Watson had communicated with O'Brien, his representative here. O'Brien had mentioned the matter to William Martin, and Martin opened correspondence with Watson. Martin then set about to procure an option on the company's property through one Kenny, a man who, apparently, was well and favourably known to Meredith and the other directors of the company.

Upon the receipt of Bent's telegram of the 14th, Meredith went to Arrowhead expecting to meet Lamb there. As Lamb did not come, he came to Winnipeg, arriving here on 21st May. In the meantime Kenny had interviewed McDonald, one of the directors of the company, with respect to procuring an option. Upon Meredith's arrival, McDonald interviewed him with respect to Mr. Kenny's request for an option, and Meredith and McDonald went to the office of McDonald, McMillan, & Co., of which McDonald is a member and Mr. Kenny is book-keeper, and had an interview with Kenny with respect to the proposed option. Kenny informed McDonald and Meredith that he had a couple of purchasers in view, and that he thought he could effect a sale if an option were given him. Meredith shewed him the telegram which he had received from Bent, and asked if Lamb was one of his prospective purchasers. At this time Kenny did not know Lamb in the transaction, and he replied that he was not, but stated that his purchasers were backed by

James J. Hill. McDonald and Meredith then, on behalf of the company, gave Kenny an option for two weeks. At the end of two weeks he was to have the right of extending the option for two months on depositing $10,000. They, at this time, gave him a letter undertaking to protect him to the extent of $50,000 in the event of the sale going through at $550,000. The option was left blank, so that Kenny might fill in any amount between $500,000 and $600,000. He at once took the option to Martin, and at Martin's request filled in the amount for $575,000, the extra $25,000 to go to Martin in the event of a sale at the figure named, and Kenny gave Martin a letter agreeing to protect him to the extent of $25,000 in the event of a sale at $575,000. This was on 22nd May, and on the same day Kenny assigned the option to Martin, who at once started for Minneapolis, where he interviewed Watson and was by him introduced to Lamb.

The next day Martin and Lamb came to Winnipeg, and on the 24th had an interview with Kenny in Mr. Martin's office. In the meantime Martin had transferred the option to Lamb. The result of that interview was that Lamb wired his cruiser to go to Arrowhead and arranged to return to Minneapolis and at once proceed to Arrowhead himself for the purpose of looking over the property.

Shortly after the 14th May, the plaintiff called at Lamb's office in Minneapolis. Lamb was absent, but the plaintiff left a note for him which he subsequently received, and the plaintiff also wrote him a letter about the 16th or 18th, which he also received.

On 23rd May the plaintiff Bent arrived in Winnipeg and had an interview with Meredith and McDonald, who informed him that they had given an option on the property. Bent then said if Lamb was the party to whom the option had been given, in the event of a sale, he would claim it as his sale. He was assured by Meredith that Lamb was not the man, but that it was some party backed by James J. Hill. Bent then requested Meredith to wire him if the option given expired on 5th June, and Meredith agreed to do so.

At the request of Kenny, Meredith went to Arrowhead to shew Lamb the property. When he met Lamb at Revelstoke on the 27th or 28th May, he asked him if he knew Bent, and was informed that he did not, that the property had been introduced to him by a college friend of his in Chicago, meaning Peck. They then proceeded to look over the

property, and, after a partial examination, Lamb said to Meredith that he would not buy under the option, but that if the parties holding the option would take $500,000 he thought he might purchase. This was about 1st June, and Lamb was then leaving Arrowhead.

On that day Lamb wrote to Peck from Arrowhead: "I have looked over the Arrowhead deal and turned it down, as I believe any other practical lumberman will do who sees it." He at the same time wrote to Martin that he had refused to buy, and returned the option to him. Martin then returned the option to Kenny.

In the meantime, on 5th June, Kenny had put up his $10,000 for an extension of his option for two months. Meredith understood from the conversation that he had with Lamb that Lamb was prepared to pay $500,000, and he was anxious to know whether or not Kenny had put up his $10,000 or whether the option had lapsed. On 7th June, he wired from Arrowhead to Kenny: "Must know to-day if ten thousand has been deposited to credit Arrowhead Lumber Co. and in what bank." On the same day Kenny replied: "Yes. Bank Ottawa. But still open to deal with parties there. You can negotiate direct with free hand if any deal in them. If not other parties expect to go out few days. Can you wait for them. Wire what you do."

In the meantime Lamb's cruiser had gone away, but was expected back in a few days, and on 10th June Meredith wired to Kenny: "Expect parties back Tuesday. I think your Mr. Martin or yourself should be here to meet them. I am satisfied they want property but are doing a little figuring."

On the 11th in reply Kenny wired to Meredith: "Martin out. Option lapsed. I protected personally. Cannot possibly go out. You act for me perfectly free hand. Give parties understand they deal direct company. Quote whatever your judgment make deal assured. Figure with them sliding scale rock bottom if necessary. Protect me all you can but deal anyway. Writing."

Upon receipt of that telegram Meredith went to Revelstoke, and there met Mr. Lockman, Lamb's representative. and asked him if he would entertain an offer of $500,000 for the property. Mr. Lockman replied that Mr. Lamb was returning the next day, but that he was going up the Columbia river to look over some other property, and if they did

not take it and desired to look further over the Arrowhead property they would communicate with him.

Meredith then wired Kenny under date 13th June: "Parties struck other property. Deal all off. Leaving for home."

Lockman did not again communicate with Meredith, but he and Lamb did make a further examination of the property. Meredith returned to Winnipeg, arriving there on the 25th June.

On the 21st June Bent had been in Winnipeg and had left a message with a friend of Meredith's stating that Meredith had promised to wire him on 5th June, on the expiration of the option given on the property, but did not do so, and requesting that he wire to 1130 First National Bank Building, Chicago, if the property sold or not, his principals waiting to go to Arrowhead. That memorandum was given to Meredith on the 25th June, and on that day he wired Bent: "We are withdrawing the property from the market for the present."

On that same day or the next day Meredith got a letter from Lamb at Minneapolis asking him to go down. This letter is said to be lost. Meredith at once went to Minneapolis, and further negotiations for a sale at $500,000 were entered into. Meredith returned to Winnipeg, and on 5th July he returned to Kenny his $10,000.

Lamb and Watson organized a company called the Lamb-Watson Lumber Company Limited, and on 18th July an agreement was drawn up for the sale to that company of the defendant company's property at the net price for the limits and mill of $500,000. The agreement was not actually carried out until 6th August, owing to some defects in the defendant's title.

On 7th August a meeting of the directors of the company was held at which the president, Meredith, reported the execution of the agreement for sale, and a resolution was passed adopting and confirming the agreement.

At a general meeting held on 25th August a resolution was passed "that the action of the officers and directors of the company in entering into the said agreement on behalf of the company be and the same is sanctioned, approved, ratified, and confirmed."

It was also resolved that a substantial commission be paid to Mr. Meredith for effecting the sale of the company's

mill and timber holdings, the commission to be determined at a meeting of directors or shareholders to be held at Winnipeg as soon after the transfer as possible.

There is also entered in the minutes of this meeting an appreciation of the excellent work of the president, Mr. Meredith, in accomplishing this sale of the company's property. Shortly after the sale was finally closed, and the purchase price paid to the company.

I find that the agreement made with the plaintiff was that if he would procure a prospective purchaser, the defendant company would quote such purchaser a price of $550,000, or, as Meredith puts it, would "name the proposition $550,000," and in the event of a sale the defendants would protect the plaintiff to the extent of $50,000, but any abatement from the named price down to $500,000 should come out of the defendants.

I find that the defendant Meredith had authority to make that bargain on behalf of the company.

I find that the plaintiff found the purchaser to whom the property was subsequently sold, and that the sale was the result of the introduction of the property to Lamb by the plaintiff.

I cannot resist the conclusion that Meredith knew when negotiating with Lamb that he was the plaintiff's purchaser. He had on 14th May been so informed by the plaintiff by telegram. He was informed personally on 23rd May that Lamb was the plaintiff's buyer. Meredith denies that Lamb's name was mentioned at the meeting on 23rd May, but in that he is not only contradicted by the plaintiff but also by his co-director McDonald, who was present. The plaintiff says Meredith on that occasion said that the party behind the Kenny option was not Lamb but James J. Hill. Meredith denies that James J. Hill's name was mentioned Kenny says he told Meredith that the man behind him was James J. Hill, a fact which makes it almost conclusive that the plaintiff's statement is correct. I think it probable that when Meredith made that statement, as I find he did, he believed it was true. When he arrived at Arrowhead and met Lamb there with the Kenny option, he must have known that this purchaser was the man introduced by the plaintiff. He admits that he asked Lamb if he knew Bent, but he accepted Lamb's denial coupled with the fact that the option was for $575,000 as a conclusive solution of the peculiar co-

incidence that there should be two "Lambs of Minneapolis" dealing for this property through different agencies at the same time.

The statement made by Lamb, if he did make it, that he did not know Bent, was untrue, as was also the statement in the letter he wrote to Peck on 1st June, that he had turned down the property. He had not turned it down. All he had done was to decline to buy under the Kenny option, an option procured at his instance independently of Peck. He still kept negotiations open with Meredith.

The telegram sent by Meredith to the plaintiff on 25th June, that they were withdrawing the property from the market, was not a candid statement of the position the matter stood in at that time. Negotiations for a sale to Lamb at $500,000 were then pending. He had offered the property at $500,000, a figure at which Lamb had said he thought he would buy, and Lamb's cruisers had been, to his knowledge, going over the property. As a matter of fact, either on that day or the next, a letter which is said to have been lost arrived from Lamb, in response to which Meredith at once went to Minneapolis and completed the negotiations for a sale.

It is not necessary to find that there was an agreement between Lamb and Meredith to side-track the plaintiff, but, if it were, I should say there was considerable evidence to support such a finding. I do, however, think that Meredith's telegram to the plaintiff on 25th June misstated the fact for the purpose of misleading the plaintiff into the belief that the idea of selling the property had been abandoned, because he knew that the plaintiff had been instrumental in sending Lamb, with whom negotiations were then pending for a sale at $500,000.

The plaintiff had performed his part of the contract by producing to the defendants a person who was willing to negotiate at the price agreed upon, viz., $550,000. It was the defendant's duty, as stated by Mr. Meredith, to "name the proposition $550,000," to such person, and not reduce that price unless the plaintiff consented to such reduction. Without the plaintiff's knowledge or concurrence the defendants sold at $500,000, and deny the plaintiff's right to remuneration because the sale price did not exceed the company's net price.

The recent decision of the Court of Appeal in Elvin v. Clough, ante, was based upon facts very different from the facts in this case, and is really an authority for the conclusion I have arrived at. It is quite apparent from the judgment of Mr. Justice Phippen in that case that if the defendant had known at the time of the sale that the purchaser had been sent by the plaintiffs, or if there had been any circumstances which should have induced him to inquire, the plaintiffs would have been held entitled to recover.

The defendants relied upon Pardee v. Ferguson, 5 O. W. R. 698 and 6 O. W. R. 810, and Bridgman v. Hepburn, 8 W. L. R. 28, but I think both cases are distinguishable. In the former case the plaintiff's alleged agent, Upton, after endeavouring to make a sale to the persons who afterwards bought, and failing, threw the matter up, and told the defendants they were free to deal without reference to him, and named to them the persons with whom he had been treating. Afterwards the defendants made a sale direct to these persons at a different price. It was held that the plaintiff, who claimed through Upton, could not recover a commission on the sale. In Bridgman v. Hepburn, the trial Judge found that the contract of employment of the plaintiff was not general to find a purchaser, but was to find a purchaser at a named figure, and that he had failed to do so.

To quote from the judgment in Elvin v. Clough: "If . . . . the owner himself negotiates with an intending purchaser introduced by the agent, the law presumes, in the absence of facts establishing a contrary conclusion, that he adopted the labour of his agent, varying the terms to suit his own convenience. It presumes a contract to pay a commission based upon the amount realized by the sale effected, regard being had to the relative value of the assistance given by the agent as compared with that which he was bound to give to earn his commission under the original agreement."

If that statement of the law be applied to the facts of this case, as I find them, the plaintiff is entitled to be remunerated for his services.

Taking the amount fixed by the parties for a completed sale as a basis, I assess the value of the plaintiff's services in procuring and introducing the purchaser to whom the defendants sold, at $25,000.

There will be judgment against the defendant company for $25,000 and costs of suit.

The action will be dismissed as against the defendant Meredith without costs.

BRITISH COLUMBIA.

HUNTER, C.J., JUNE 29TH, 1908.

CHAMBERS.

REX v. SHEEHAN.

Criminal Law—Vagrancy—Criminal Code, sec. 238 (a)—Means of Support—Gambling—Evidence.

The accused was convicted by George Jay, police magistrate in and for the city of Victoria, on 18th June, 1908, on an information charging the accused "for that on the 16th day of June, 1898, at the city of Victoria, and on the days immediately preceding that day, you were a loose, idle, and disorderly person who, not having any visible means of maintaining yourself, unlawfully live without employment in the said city," and was sentenced to 3 months' imprisonment with hard labour.

This was an application for an order nisi directed to the magistrate to shew cause why a writ of certiorari should not issue to quash the conviction, on the ground, inter alia, that there was no evidence to warrant the conviction, and that it was made without jurisdiction, inasmuch as no offence was disclosed in such evidence. A motion to shew cause why a writ of habeas corpus should not issue also came on for hearing at the same time, in aid of the former motion.

The evidence disclosed that Detective George M. Perdue knew the accused and had known him for a number of years, and that he, the accused, had been in Victoria off and on for over a month; that he never knew the accused to do any work; that he is in company with prostitutes and vagrants; and that he met the accused in the street on the 16th instant in company with a prostitute. Detective Perdue, who was accompanied by Constable McDonald, said to the ac-

cused: "We are police officers and would like to know what you are doing for a living—give us a satisfactory account of yourself." The accused said he was trying to get the girl —the prostitute above referred to—over to Seattle; that she was an opium fiend and a wreck, and wanted to get over to Seattle. As to what he was doing for a living, the accused said he followed the race track, had been at the Vancouver meeting and the race meeting in Victoria; that he gambled, but had lost $400 in the last week in Victoria gambling. He had not done anything else. Evidence as to the accused's record was objected to by accused's counsel. In cross-examination Detective Perdue stated that there was a certain race meet held in Victoria at the driving park for several days, and that the accused had on his person when arrested the sum of $27.20; that he had seen the accused touting on the race track; that he had never known the accused to beg. Constable Dawley gave evidence that on the previous Sunday he had seen the accused in an opium joint on Fisguard street, in company with the prostitute above referred to; and in cross-examination that there were or might have been a lot of horsemen—men who were connected with the race-meet—in the place at the time as well as the accused. Sergeant Carson gave evidence that he had known the accused for several years and never knew him to do any work; that the accused was a man he had always seen around the streets in a respectable way; that he had never seen him drunk; and that he always seemed to have money—"which I believe he gets from the avails of prostitutes." Evidence was also given by this witness, and was objected to, that the accused in May, 1908, was registered in the Brunswick Hotel as "E. Stanley and wife." Constable McDonald's evidence corroborated that of Detective Perdue and was practically to the same effect.

Lowe (Moresby & O'Reilly), for the motions, contended that there was no evidence which would warrant the conviction of the accused under sub-sec. (a) of sec. 238 of the Code, and referred to Regina v. Basse, 10 P. R. 386.

H. D. Helmcken, K.C., for the Crown and the magistrate.

HUNTER, C.J., held that the conviction must be quashed, as there was no evidence to warrant it under sub-sec. (a) of sec. 238 of the Code. The accused had means of support, as

was disclosed in the evidence, viz., the sum of $27.20. While the accused might have been convicted under another sub-section of the same section, still he could not on this charge, on the evidence. The Chief Justice was of the opinion that on a charge under this particular sub-section evidence that the money on his person at the time of his arrest was obtained by the accused by gambling was immaterial to the charge.

Motions granted. Conviction quashed and order made for the prisoner's release.

ALBERTA.

HARVEY, J. JUNE 15TH, 1908.

CHAMBERS.

RE WILSON.

Executors and Administrators—Executor's Accounts—Agreement with Residuary Legatee—Enforcement—Remedy—Action—Originating Summons—Costs.

Originating summons under Rule 481 issued on the application of the residuary legatee under the will of John C. Wilson to compel the executor to transfer the estate to the applicant.

G. B. Henwood, for the applicant.

C. A. Grant, for the executor.

HARVEY, J.:—The deceased died in 1904. Two years later, by order of a Judge, the accounts of the executor were gone into by the acting clerk at Wetaskiwin, who made a report by which he found the sum of $539.39 in the executor's hands. Against this sum there were payments made by the executors of $294.09 which were not allowed by the clerk because he thought they did not come within the terms of the order of reference, and which he reported specially. Assuming these to be proper payments, there would be $245.30 for which the executor would have to account. The accounts gave the executor credit for his commission for

managing the estate, but did not include his law costs. The report also found that the executor had 42 head of cattle belonging to the estate.

Immediately prior to the time appointed for application for confirmation of this report, the executor and the residuary legatee, who was then the only person beneficially interested in the estate, entered into an agreement in the following terms:—

"Articles of agreement made in duplicate the 26th day of July, in the year of our Lord 1907 between Dr. W. F. Wilson, of the city of Toronto, and Cammille David, Esq.

"This copy of agreement entered into between Dr. W. F. Wilson, of Toronto, representing Martha Wilson, heir of the late J. C. Wilson, and Cammille David, Esq., executor of the above estate, as there has been a difficulty between the said Dr. Wilson and Cammille David, it is now mutually agreed (though this agreement in no way whatever interferes with any order of the Court given to this date which is binding on both parties).

"Agreed that said David hand over forthwith all moneys now owing the estate, the sum at least of $220, of cattle 44 head more or less, also all lands, papers, etc., belonging to said estate, on consideration that Dr. Wilson agrees to share one-half of all legal expenses of whatever character incurred in connection with the estate since May 12th, 1905, and Dr. Wilson further agrees to give Mr. David the sum of $150.

"This agreement is entered into in good feeling and faith, and there are to be no extra charges or demands of any kind whatever made by either party after this agreement is signed.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in the presence of

Murtho Wilson,
W. F. Wilson,
Per Attorney
W. F. Wilson,
Cammille David,
Fred. V. Peacock,
Witness.

Windsor Hotel,
Edmonton."

Though somewhat peculiarly worded, it is admitted that this is an agreement between the executor and the applicant. The executor has not carried out the terms of the agreement, and the matter now comes before me by way of originating summons, under Rule 481, on the application of the residuary legatee, to compel the executor to transfer the estate to the applicant.

It was contended, though not on the first consideration of the application, that by virtue of the agreement the applicant's only remedy is by way of action to enforce the terms of the agreement. I cannot accept the contention. It involves the conclusion that the relationship of executor and beneficiary has terminated. In my opinion, no such result is effected by the agreement, which merely settles the state of accounts between the executor and beneficiary. I am quite satisfied from the material before me that the executor has wilfully neglected or refused to carry out the agreement without just cause. The cattle were running on the prairie at the time the agreement was signed, and, though requested to have them gathered up so that the legatee could take delivery of them, the executor has refused to do anything, but has simply replied that they were there and the legatee could take them. In my opinion, this does not satisfy the burden which the agreement casts on him. The agreement says he shall hand them over. He must, therefore, have them in such a position that he can deliver them when called upon. The legatee, probably in order to avoid trouble, did attempt to gather them up, but could find only about half of the number specified. The executor must deliver the remainder. It is contended that the number is "44 more or less," and that the executor can therefore only be called on to deliver such as may be found.

It is to be observed that the amount of money specified is "all moneys now owing the estate the sum at least of $220," and that there is a clause in the agreement that it is not to interfere with any order of the Court. The evidence shews that this agreement was prepared by the representative of the legatee, a clergyman, in a hotel, on the day when the report of the clerk was to come up for consideration. It seems to me that the intention of the parties was to take the amount as found by the clerk's report, which was not before them, but which they would probably consider as an order

of the Court, and that $220 and 44 were as near as their memories enabled them to specify. The amount and number as found by the report are $245.30 and 42 respectively, and I find that the executor is liable to account for this sum and this number of cattle.

It is not questioned that the term "legal expenses" was intended to mean "law costs," but it is contended by the applicant that his law costs are to be included in it, and each party is to bear half the costs of both parties. Inasmuch as the agreement to share costs is only on the part of the legatee, I fail to see how this contention can be sustained, for the executor, either personally or as executor, would not be liable for any of her costs except by agreement or by order of the Court. The executor's costs, however, it is quite clear, are intended to end at the date of the agreement, and, as this application has been made necessary by his default, he should bear personally not only his but the applicant's costs of it, except the costs of the cross-examination on his affidavit, which proved futile for the purpose for which it was desired.

There will be a reference to the clerk at Wetaskiwin to ascertain how many of the 42 head of cattle in the possession of the executor on 26th July, 1907, have been received by the applicant, and the number and value of the remainder, including the increase, if any, and to tax the executor's proper costs in connection with the estate from 12th May, 1905, to 26th July, 1907, including the costs of such taxation, and to tax the applicant's costs of this application, including the costs of the reference other than the taxation of the executor's costs, the executor to be allowed to set off against such last mentioned costs the sum of $5 for his costs in connection with his cross-examination. The executor shall execute all proper conveyances of the property of the estate in his hands to the applicant, and deliver the same with all certificates of title or other documents relating to or affecting such property to the applicant's solicitor within 30 days, and within the same time pay into Court the sum of $95.30, being the difference between the sum of $245.30 which the executor is required to pay, and the sum of $150 which the applicant agreed to pay the executor. Leave reserved to either party to apply for further consideration.

ALBERTA.

STUART, J. JUNE 23RD, 1908.

TRIAL.

ROBERTSON v. MORRIS.

Sale of Goods—Acceptance—Subsequent Attempted Repudiation—Misrepresentation as to Condition—Rescission of Contract—Condition—Warranty, Express or Implied —Evidence—Sale of Goods Ordinance.

Action for damages for misrepresentations upon the sale of a motor-car by defendant to plaintiff, or to rescind the contract for sale and for the return of the purchase price.

C. A. Grant, for plaintiff.

O. M. Biggar, for defendant.

STUART, J.:—In this case there is not the slightest doubt that the plaintiff could have had no chance whatever of succeeding had it not been for the amendment which was asked for and allowed at the opening of the trial by which a claim for damages for breach of warranty was added. It is quite clear that the plaintiff accepted the car, and that it became his property, particularly in view of the fact that no attempt at repudiation was made until some months had passed. Plaintiff's counsel urged strongly that there was a material, though no doubt innocent, misrepresentation as to the condition of the car, and that when this was discovered the plaintiff had a right to rescind the contract entirely. The cases cited, however, do not refer to the sale of goods, and, although the principle of those cases no doubt applies to such a sale, it plainly amounts to no more than this, that the truth of the representation must be taken as a condition of the contract, and if the goods are accepted and the property passes, the condition sinks to the position of a warranty unless there is an express or implied term in the contract giving a right of rejection: see sec. 13, sub-sec. b, of the Sale of Goods Ordinance. As I have said, there can be no doubt whatever that the property had passed to the plaintiff long before the attempted repudiation, and, as there was no express agreement permitting an ultimate re-

jection at so late a date, and nothing in the evidence which, in my opinion, would establish an implied agreement to that effect, the alleged condition, if it did exist, must clearly be treated merely as a warranty, for the breach of which damages is the only remedy.

It was contended by the plaintiff that the defendant had given an express guarantee with respect to the condition of the car at the date of sale, and that there was an express warranty that the car was in perfect running condition. I have been unable to discover, even in the plaintiff's own evidence, any satisfactory ground for concluding that such a warranty was given. The plaintiff swears that the defendant used a number of expressions in commendation of the car, but, with one possible exception, none of these expressions can be considered as anything more than such praise as a vendor may quite legitimately give to an article which he is seeking to sell. The plaintiff swore that he told the defendant that if he, the defendant, would guarantee the car to be in perfect running condition, he would give him $2,000 for it on certain terms; that the defendant asked slightly better terms as to time; and that he, the plaintiff, repeated his offer, which was $500 down and the balance in 4, 8, and 12 months, and that the defendant finally said, "all right," he would accept those terms. This is the only evidence given by the plaintiff from which an express warranty could by any possibility be inferred; but it will be noticed that he does not even pretend to assert that the defendant himself used any words or expressions which could be interpreted as a warranty; and it is by no means clear, to my mind, even taking the plaintiff's account as true, that the defendant's final acceptance of the terms offered was really meant by him to include an acceptance upon the condition as to a guarantee with which the plaintiff states his offer was at first accompanied. The defendant, moreover, denies that he gave any express warranty, and I therefore think the plaintiff has entirely failed to prove that any such warranty was given.

Moreover, even if it had been given, I am of opinion that the plaintiff failed to prove that the car was not in perfect running condition at the time he received it. The defects or breakages in the gearing on the back axle were not discovered by the plaintiff for 10 or 15 days after he had been himself running the car. He was a perfect novice at handling the intricate machinery of an automobile, and it seems to me that the most reasonable conclusion to be drawn from

the evidence is that considerable harm was done to the machine by himself during that period. The evidence of independent witnesses shews that the car had been running well in the defendant's hands up to the time of the sale, and the plaintiff himself says he had very little trouble with it for some time after he started to use it. It is impossible, therefore, for me to come to the conclusion that the car was not in perfect running condition at the time the plaintiff took possession of it. It may, no doubt, have been worn to some extent by the previous year's use, but I am quite unable, upon the evidence, to find as a fact that the defects which were revealed when the car was overhauled had existed at the time of the sale, and were not, in the main, caused by the plaintiff's own inexperience and awkwardness in handling the car.

It was also contended by the plaintiff that, quite aside from any express warranty, there was by law an implied condition that the car was reasonably fit for the purpose for which it was bought, but I do not think the case comes within the provisions of sec. 16, sub-sec. 1, of the Sale of Goods Ordinance, which was relied upon as covering this case. I am of opinion that it was not shewn that it was in the course of the defendant's business to supply automobiles. It is true there was some evidence that he had been intending to take an agency for the Russell cars, but it did not appear that he had ever really gone into that business. Indeed it appeared that the plaintiff was told that the very reason why the defendant desired to sell this particular car was because he was leaving Edmonton. The plaintiff knew that the car had been used for one season, and that he was virtually buying a second-hand car, and I therefore do not think that the plaintiff looked upon the defendant as occupying the position of a regular dealer in automobiles; and I am of opinion also that the defendant did not, in fact, occupy that position. The case would, therefore, not come within the provisions of the section in question. Even if the case were covered by that section, however, I think the plaintiff failed to prove that the car was not reasonably fit for the purpose for which he wished to use it. It is true that considerable evidence was given tending to shew that the construction of the machinery on the back axle was not as perfectly designed as it might have been, but it was surely incumbent upon the plaintiff to shew something more than that the car might have been constructed upon a better

design. He was surely bound to shew that the plan of construction adopted was an unreasonable one, that is, a plan which no reasonable manufacturer could possibly adopt. This, I think, he, in any case, failed to shew. For these reasons, I think the action must be dismissed with costs.

SASKATCHEWAN.

RIMMER, DIST. CT. J. JUNE 8TH, 1908.

CHAMBERS.

JONES v. CENTRAL CANADA INSURANCE CO.

Writ of Summons — Service on Foreign Company — Service on Ordinary Agent in Jurisdiction — Validity where Attorney Appointed under Foreign Companies Ordinance—Rules of Court—Repugnancy.

Application by defendants, a foreign incorporated company, to set aside service of the writ of summons, upon the ground that the service was irregular as made on G. B. Gibson, the company's agent at Alameda, instead of A. L. Gordon, the attorney appointed to accept service of process in the province, under the Foreign Companies Ordinance, and that A. L. Gordon was the only person in the province authorized to accept service on behalf of the company.

E. W. Harris and C. W. Teed, for defendants.

A. E. Vrooman, for plaintiff.

RIMMER, DIST. CT. J.:—The material filed does not shew that any person accepted service of the writ on behalf of the defendant company, and the last ground was not argued. The writ was served on G. B. Gibson, the company's agent at Alameda.

For the defendant company it was ably argued that the special legislation of the Foreign Companies Ordinance, sec. 5, sub-sec. (a), was outside the general legislation of the Rules of Court (Rule 14 (3)); that the maxim generalia specialibus non derogant applies; and that at law, until all means are shewn to have been exhausted to effect service

on the attorney appointed under the Foreign Companies Ordinance, service in the manner prescribed by the Rules of Court for service on a corporation should be set aside. For the plaintiff it was argued that there was no repugnancy between the Rules of Court and the Foreign Companies Ordinance in respect to service of process, and that the provisions of the two Acts must be read together, if possible, so as to give effect to each.

It appears to me that it has been assumed by the defendant company that the Foreign Companies Ordinance cannot be read so as to harmonize with the Rules of Court. The first question to be determined is whether this assumption is correct. In City and South London R. W. Co. v. London County Council, [1891], 2 Q. B. 513, A. L. Smith, J., although he held that the effect of sec. 4 of the City of London and Southwark Subway Act, 1887, was to repeal in part sec. 75 of the Metropolitan Management Act, 1862, said: "I agree that if the two sections can be read so as to stand together, they ought to be so read." These words are to be applied to the Acts now under consideration. The following expressions are also applicable. Lord Blackburn in Young v. Mayor of Leamington, 8 App. Cas. 517: "We ought in general in construing an Act of Parliament to assume that the legislature knows the early state of the law." And Lord Halsbury in Ex p. Kent County Council, [1891] 1 Q. B. 725: "We think the legislature must be taken to have been aware of the state of the law as pronounced by the House of Lords in 1878." Also Lord Hobhouse in Barker v. Edgar, [1898] A. C. 748: "When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provisions, unless it manifests that intention very clearly." The matter to which the legislature devoted special attention in Rule 14 (3) was service of corporations. The law which the legislature is assumed to have known when the Foreign Companies Ordinance was passed in 1903 appears to me to have been Rule 14 (3) of the Rules of Court whereby provision was made for service of corporations generally and of corporations whose chief place of business was without the Territories (now provinces) particularly: and that in Ehman v. New Hamburg Co., 4 Terr. L. R. 365, Richardson, J., held, following Murphy v. Phoenix Bridge Co., 18 P. R. 495, that the fact that there was a

person within the province with exceedingly limited authority who when it was served was not the agent of the company (it also being sworn that the company had no agent in the province) was not sufficient to bring a company whose chief office was without the province under the jurisdiction of the Court. Accordingly the legislature provided, by sec. 5 of the Foreign Companies Ordinance, that, as a condition precedent to registration, a foreign company should file in the office of the registrar a duly executed power of attorney to accept service, and provided what that power should contain.

Surely the intention of the legislature, as determined by the state of the law known to it and the language of the Act, in the case of a foreign company asking for registration and exemption from the heavy penalties imposed on a company doing business without registration, was that for the protection of persons doing business with the company in the Territories (now provinces) the company should submit itself to the laws and jurisdiction of the Courts of the country. The words of sec. 9 of the Foreign Companies Ordinance contemplate service otherwise than on the attorney appointed under sec. 5. Compare sec. 12 with sec. 14 of the Companies Ordinance. I certainly find no clearly manifest intention to repeal Rule 14 (3) of the Rules of Court. I would apply to this Rule the words of Cotton, L. J., in Huggins v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519, at p. 522: "I see nothing in this Rule which shews that it is not applicable to foreign corporations, i.e., corporations established by foreign law which are carrying on business and therefore are resident in and are submitting themselves to the laws of the country."

I hold that sec. 5 of the Foreign Companies Ordinance can stand with Rule 14 and Rule 5, and does not impliedly repeal or derogate from those Rules. There is no evidence nor was it argued that G. B. Gibson was not an agent or representative within the Rule. In this respect the present case is distinguishable from Ehman v. New Hamburg Co. above cited. For the defendant company the cases of Evans v. Dublin R. W. Co., 14 L. J. 245, and Lamont v. Canadian Pacific R. W. Co., 5 Terr. L. R. 69, were cited in support of the contention that a special mode of service must be followed. No special mode is clearly provided. The first case turns, as does Murphy v. Phoenix Bridge Co., upon the question of want of jurisdiction. Lamont v. Can-

adian Pacific R. W. Co. turned actually upon the paramount authority of the Dominion Parliament in this country before provincial powers were conferred. The judgment of the learned Chief Justice is on this point, and, referring to Tytler v. Canadian Pacific R. W. Co., 29 O. R. 654, and 26 A. R., he states his inclination to accept that case as directly applicable in the provinces. See too the observation of Newlands, J., in Rex v. Massey-Harris Co., 6 Terr. L. R. 156. The effect of Lamont v. Canadian Pacific R. W. Co. is diminished by the Saskatchewan Act and the Judicature Act of this province. It would not, I think, be applicable to the provisions of Rule 14 under the Judicature Act.

I dismiss the application with costs in the cause to the plaintiff. Defendants to have 14 days to plead.

SASKATCHEWAN.

WETMORE, C.J. JUNE 9TH, 1908.

CHAMBERS.

KENT v. CLARKE.

Interim Injunction—Usual Undertaking as to Damages—Plaintiff out of the Jurisdiction—Undertaking of Solicitor or other Responsible Person in Jurisdiction—Practice—Costs.

Motion by plaintiff to continue an interim injunction, in the circumstances mentioned in the judgment.

A. L. Gordon, Regina, for plaintiff.

T. S. McMorran, Regina, for defendant Smith.

WETMORE, C.J.:—This is an action, among other things, for a declaration that the defendant Clarke has a one-half interest in certain lands, the certificate of title of which is in favour of the defendant Smith, and that the plaintiff, who was an execution creditor of Clarke, has a lien in respect to such one-half interest for the amount of his executions; the principal ground alleged for such claim being that the defendant Clarke paid one-half the purchase money for the lands, and that his interest was vested in Smith for the

purpose of hindering, defeating, and delaying creditors. On 4th April last I granted an interim injunction restraining the defendants from selling or otherwise dealing with the lands in question, and it was granted upon the plaintiff by his counsel entering into the usual undertaking to abide by any order that might be made by the Court or a Judge as to damages, and leave was granted for the plaintiff to move to continue the injunction. Notice of motion was given, and it came on for hearing before my brother Johnstone, who refused the application and set the injunction order aside, on the ground that the affidavit of the plaintiff did not purport to be sworn before an officer authorized to take it, but he gave a further interim injunction order with leave to the plaintiff to apply to continue it, and he granted leave at the return of the motion to use the material that was used on the first application, except the affidavit of the plaintiff, which he held to be bad, and this last mentioned application came on before me.

The plaintiff applied in the first place to cross-examine the defendant Smith, Jacob P. Wall, and Martin M. Klassen on their respective affidavits filed on behalf of the defendants. Mr. McMorran appeared for the defendant Smith and took some preliminary objections to the injunction order. He contended, first, that, inasmuch as the statement of claim did not set forth that Clarke was insolvent, it disclosed no cause of action under sec. 38 of the Assignments Act, ch. 25 of 1906. The statement of claim sets forth that the plaintiff had recovered judgments against the defendant Clarke for large amounts and placed executions therefor in the hands of the sheriff to be executed; that the sheriff has not been able to realize under these executions; and that Clarke, with intent and design to defeat, delay, and hinder the plaintiff and his other creditors, and with the collusion of Smith, procured his one-half interest in these lands which were purchased to be vested in Smith, Clarke's one-half interest being paid for to the vendors with Clarke's own money. I will not on this application decide the question so raised by Mr. McMorran.

The injunction order provides that upon the application of counsel and upon reading certain affidavits, and "the plaintiff by his counsel undertaking to abide by any order the Court or a Judge may make as to damages herein in case the Court or a Judge shall hereafter be of opinion that the defendants have sustained any by reason of this

order which the plaintiff ought to pay," the defendant is enjoined from dealing with the property. The objection is taken that this is merely the undertaking of the plaintiff, and that he is resident without the jurisdiction, and that it is therefore not sufficient. This is merely the undertaking of the plaintiff. Counsel do not undertake for themselves, they merely according to the practice undertake for their client. The plaintiff being non-resident, the undertaking ought to have been by his counsel themselves—not merely on his behalf—or the undertaking of some responsible person residing within the jurisdiction: Kerr on Injunctions, 4th ed., p. 567; Seton on Decrees, 5th ed., p. 456, citing Hamilton v. Board, 1 N. R. 379. This report is not available for me, and I rely on the text books. It is stated in Seton on Decrees, p. 455: "Except in cases where the plaintiff's right is perfectly clear, or damage from granting it is unlikely to accrue, the Court will not (unless under special circumstances) grant an interlocutory injunction either ex parte or on notice, without an undertaking as to damages, and the registrars are instructed always to insert it." I have consulted my brother Johnstone with respect to the order, and he informs me that he gave no special order as to the undertaking, expecting that the parties would follow the practice as to inserting the undertaking in the order; and the practice is as I have just stated.

In Tucker v. New Brunswick Trading Co., 44 Ch. D. 250, the action was brought against the New Brunswick Trading Co., one Matthews, and Lamplough & Co.; a notice of motion was given, and the New Brunswick Trading Co. and Matthews appeared before the Judge; Matthews asked for an undertaking. Lamplough & Co. were not served with the notice of motion and did not appear before the Judge. The order was passed and entered with an undertaking only as to damages that might be incurred by the New Brunswick Trading Co. Matthews and Lamplough & Co. appealed. The Court held that Matthews's appeal must be allowed and the undertaking given; but as for Lamplough & Co., it held that their appeal could not be allowed because they had not asked for an undertaking before the Judge below, as Matthews had. And the ground on which Matthews's appeal was allowed was that if he had applied to the Judge below (Chitty, J.), he might have set the matter right so far as Matthews was concerned, because, though the order had been passed and entered, he had jurisdiction

to correct it if not rightly expressing the order he had made. In so far as Lamplough & Co. were concerned, because they had not asked for an undertaking, their appeal was refused, and Lindley, L.J., states at p. 253: "Lamplough did not ask for an undertaking, and, for anything we can tell, if he had done so, the plaintiff would have declined to take an injunction." I must say that I do not see my way clear to follow that case, and I conceive that I am not bound by it. The decision was made in 1890, and the decisions of the Courts in England, other than those of the Judicial Committee, were not then binding upon the Courts here. As the practice was (and it seems to be laid down as I have stated), I cannot see why Lamplough & Co. were not entitled to have the security which the registrar ought to have inserted in the injunction order. If they had been served with notice of motion, and did not appear, I could understand it, but they were not served with a notice of motion.

In Attorney-General v. Albany Hotel Co., [1896] 2 Ch., North, J., lays down at p. 699 the following: "An applicant for an interlocutory injunction must give an undertaking to be answerable in damages as a condition of his obtaining the injunction . . . This rule is one of comparatively recent introduction . . . The insertion of such an undertaking has now become a matter of course." And James, L.J., in Graham v. Campbell, 7 Ch. D. 490, said that the undertaking in damages ought to be given on every interlocutory injunction, and, unless under special circumstances, effect ought to be given to it . . . Upon drawing up an order for an interlocutory injunction the registrar invariably inserts such an undertaking on the part of the plaintiff, even though, as frequently happens, it has not been mentioned in Court, but has been taken for granted. Of course such an undertaking must be voluntary; the Court cannot compel a person to give an undertaking; and, if the plaintiff declines to give it, either in Court or before the registrar, the order will not be made, or, if pronounced, will not be drawn up . . . In the absence of any express direction of the Judge to the contrary, the undertaking will always be inserted in the order." I think North, J., lays down with great clearness the general practice in this respect. That being so, it is the duty of counsel or solicitor to see that the order is taken out in compliance with the practice. He must know that, if his client wants the injunction, the order has to be given in accordance with the prac-

tice. Here was an ex parte application of which the defendants had no notice and could not be heard. The first opportunity they had of being heard was at the return of the notice, and at the first opportunity they took the objection that they had not the security which the practice provides. It is true, as stated by North, J., that the giving of the undertaking is voluntary. If the order had been properly drawn, and the plaintiff did not choose to give the undertaking, then he would not have got his injunction order. I am of opinion that I am in a position to say, "You must make this defendant right." I do not order that the plaintiff must give an undertaking, but I am of opinion that I must order that unless he does give the security provided for, the injunction order will not be continued.

The order therefore will be that unless the plaintiff within 20 days files with the local registrar the undertaking of his counsel to pay damages, according to the practice, or the undertaking of some responsible person residing within the jurisdiction to the satisfaction of the local registrar, this application will be refused and the injunction order and any continuance thereof will therefore expire. Plaintiff will pay the defendant's costs incidental to this order, and this application will stand adjourned to Tuesday 7th July next; and in the meantime this injunction will be continued.

I make this order as to costs because the undertaking on the interim injunction order granted by me was in substance the same as on the order granted by my brother Johnstone, and when the application to continue my injunction came before him this very question was raised. The plaintiff therefore must have been aware that it would probably come up again, as Judge Johnstone made no decision with respect to it. He therefore, if I may use the expression, with his eyes wide open perpetrated the same error, and under such circumstances I am of opinion that he should pay costs.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 10TH, 1908.

TRIAL.

THOMPSON v. MILLING.

Principal and Agent—Agent's Commission on Sale of Land —Services Rendered in Procuring Purchaser—Purchaser not Found by Agent — Negotiations with Purchaser — Quantum Meruit—Implied Contract to Pay for Services.

Action for commission on the sale of land.

J. A. Allan, Regina, for plaintiff.

H. G. W. Wilson, Indian Head, for defendants.

PRENDERGAST, J.:—This action was brought for $600 commission payable by the defendants to the plaintiff upon the sale of 640 acres of land, at the defendants' request, and, in the alternative, for services rendered by the plaintiff to the defendants as a real estate agent at their request, whereby the plaintiff procured a purchaser of the said lands.

In course of trial, before the plaintiff closed his case, I allowed the claim to be amended by adding to the allegation that the plaintiff procured a purchaser, the words, "or assisted in procuring," etc.

It appears that in the beginning of August, 1906, J. T. Hunt, of Thompson and Hunt, real estate brokers of Indian Head, called at the residence of John Milling, one of the defendants, also of that town, and, not finding him there, left word that he desired to see him with reference to purchasing the land in question. A few days later John Milling called at the said firm's office, when Hunt asked him what his terms were. But John Milling said he could do nothing without first consulting with his brother Robert, the other defendant.

About the same time, John Milling received a letter from the plaintiff, also inquiring about the same land, and on 11th August he went to the office of the plaintiff, who told him that he had two purchasers in view. The plaintiff admits that Thompson and Hunt were not among those

prospective purchasers. John Milling, however, declined again on this occasion to state any terms before seeing his brother. But on 13th August the two defendants together met the plaintiff in his office, discussed the matter, and eventually signed a listing form for the selling of the 640 acres, wherein the time price is set at $35 an acre, the cash price at $20,000, and the commission at 3 per cent.

The plaintiff admits that the first time he heard about Thompson and Hunt as probable purchasers was from the Millings themselves. The plaintiff and his clerk Ricard swear that this was some days after the listing, which would perhaps go to shew a distinct and separate agreement between the parties with reference to Thompson and Hunt, while the defendants say that it was on the day of the listing, and give circumstances from which it would appear that it was virtually part of the same transaction. At all events, nothing was effected by the plaintiff with the persons whom he had in contemplation when he first wrote to the defendants, and the negotiations which followed with Thompson and Hunt are the only ones here in question.

It appears that the plaintiff first saw George Thompson about 19th August, and then stated the price as $35 an acre (or $22,400), upon which the latter offered $19,000. The plaintiff reported this to the defendants, who said they wanted $20,000. The plaintiff says that on that occasion John Milling told him to try and have that clear, but, if he could not, they would pay him the commission out of that amount. John Milling, on the other hand, insists that they wanted $20,000 clear, but, after saying that the plaintiff spoke of splitting the commission, he admits that he "might have given him a little encouragement." The plaintiff then went back to George Thompson a second time, which was on 23rd August, and stated to him that the defendants would take $33 an acre, or $21,120. George Thompson replied that he would give $20,000 if they threw in the grain that was on the place, estimated at about $1,000, and upon this new proposition being submitted to him by the plaintiff, John Milling again declined it, saying it was virtually the same offer as the first.

This interview seems to have wound up by the plaintiff saying that he was going away for two or three days, but would be back to look after the deal. He left the same day (Tuesday 23rd August) for the lake, where he spent 10 days with his family, leaving his office in charge of his clerk, P. M. Ricard.

The plaintiff says, "When I left, the deal was not off:"—and George Thompson: "He said he was going to the lake and would like to close; and I said it was in his own hands and we were anxious to get it and to close it: we were anxious to get it and in a hurry to get it."

After the plaintiff had left, John T. Hunt says he went to see the Millings 2 or 3 times to press the deal. He says: "The man we had in view as a purchaser told us that unless he got it by a certain day he would not want it. I told John Milling we had to have it by a certain time; that was a few days before we closed the deal. He adds: "My dealings with the Millings were just conversations with reference to the plaintiff, in order to have the Millings hurry the plaintiff's return. I had no conversation with the Millings about the price before the deal was closed." George Thompson says: "We were anxious to get it, and in a hurry to get it. There were special reasons for it. We were buying for ourselves, but to turn it over to another party, and we were afraid he would change his mind."

The plaintiff having left on the Tuesday, John Milling says that he went to his place on the Friday and Saturday of that week and the Monday, Tuesday, Thursday, and Saturday of the following week, but found only the clerk there. He says: "On the Tuesday following (which was in the third week), I went in again, and he was home. I told him that Thompson and Hunt had been hounding me every time they saw me about making a deal, and told him just what they said, and that I wanted him to go and see them, and he said, "Let them sweat awhile, it will be easier to deal with them after a while." It ran along again until Saturday evening. When my brother and I were going down town after dark we were passing Thompson and Hunt's office, and one or the other of them stood in the door and spoke to us, and we stopped and talked to them, and they asked us to go in, and we went in and made the deal."

The plaintiff says: "I returned on 3rd September. I was 10 days away. When I came back I saw John Milling, and tried 3 or 4 times to see George Thompson at his office, but could not. Milling asked me to hurry up and close the deal . . . Later he told me the deal was closed. . . Between the conversation telling me to hurry up and the conversation telling me the deal was closed, there was one other conversation telling me again to hurry and close." And yet he did not manage to see Hunt and Thompson once after

returning from the lake, although he (the plaintiff) says himself: "George Thompson had a regular office in Indian Head, and it was in my way." J. T. Hunt says also: "I was at the office every day. I was available all the time."

Was the plaintiff bound, after submitting the same to the defendant, to report to Thompson and Hunt that their offer of $20,000 with the wheat thrown in had been rejected? Was there after that an offer of $20,000 without the wheat thrown in? Is it so that it was a condition at the outset that the defendants should interfere in no way, and let the plaintiff manage the whole matter alone? Had the plaintiff a bona fide belief that he could better attain his object by letting Thompson and Hunt "sweat"? And had he some personal and unknown object, or was the delay or failure to see George Thompson simply a matter of neglect? These questions seem to me unimportant, as, whatever the answer might be, the defendants, in my opinion, were justified, in the circumstances, in taking the matter in their own hands and closing the deal themselves.

Even if the delay and inactivity on the plaintiff's part was not merely a matter of neglect, but meant as a tactical proceeding on his part, it seems clear that it was a mistaken one, one which might easily have defeated its object, and the defendants were under no obligation to stand by, after their repeated visits to his office, and let the opportunity for such an important transaction vanish.

The plaintiff, then, cannot be entitled to the full commission. But is he entitled to any commission at all?

To begin with, the plaintiff's own evidence is clearly to the effect, as already stated, that he did not find a purchaser, that nothing resulted from his dealings with the two other persons he had in mind at the start, and that it was the defendants who mentioned Thompson and Hunt to him first, when they informed him that George Thompson had already called upon them with a view to buying the property. He cannot recover for having procured, or (under the amendment) for having assisted in procuring, a purchaser.

Did the plaintiff effect a sale, as I hold the contract to be? He surely did not bring the sale to a close. Nor does it appear that he strictly followed his instructions. It appears, as already stated, that after the defendants told the plaintiff that they would accept $20,000 plus the amount of commission, or even $20,000 if need be, he asked Thomp-

son and Hunt $21,120. There is also evidence, although, I must say, not altogether satisfactory, that Thompson and Hunt submitted to the plaintiff a third offer of $20,000 without the grain thrown in, and this he did not report to the defendants. But, whatever may be of that, the sale was not brought to a close by the plaintiff. The contract to effect a sale, in my opinion, should be considered here as an entire contract, and the more so as, contrary to the usual cases, that is all that he had to do, inasmuch as he did not have to find a purchaser. This seems further emphasized by the plaintiff's testimony that it was agreed that the defendants should leave the whole matter strictly in his hands, to be dealt with exclusively by him.

In Wycott v. Campbell, 31 U. C. R. 584, the judgment of the Court was that the defendant, having accepted and dealt with a purchaser found by the plaintiff (who was a land broker), though not such a purchaser as the agreement called for, the plaintiff was entitled to recover the value of his services on the common counts. In Morson v. Burnside. 31 O. R. 438, the judgment was substantially the same, and on the same grounds. And so was the judgment of the Chief Justice of this Court in the quite recent case of Milestone Land and Loan Agency Co. v. Lucksinger, not yet reported.

But in all those cases the purchaser was found by the land agent. I cannot find, and do not think there is, a case where, the purchaser being found by the owner, a quantum meruit was allowed to the land agent when the contract was to effect a sale.

It seems to me that the principle underlying the above cases is after all the well-known one, that a party cannot recover for a part performance of an entire contract unless the other side has accepted the benefit of the part performance under circumstances implying a promise to pay; and the circumstances are not deemed to imply such a promise when the party adopts it by effect of some compulsion or necessity, or in the exercise of an independent right. When the land broker, as in the class of cases above referred to, brings to the owner a purchaser whom he has found, and who is willing to buy, although on terms altered from the original ones, the owner is quite free to reject them; but, if he accepts them, inasmuch as he does so freely and voluntarily, the promise will be implied that he is to pay at least to the extent that he is benefited.

But this is not the case here. The defendants had a right to continue with Thompson and Hunt the relations which already existed between them before and independently of anything the plaintiff ever did. Because the plaintiff was not willing or not in a position to perform the entirety of his contract, the defendants were not bound to penalize themselves by abstaining from dealing with the purchaser whom they had found. They stand in the same position as a man who has temporarily left his house pending certain repairs: his re-entry will not necessarily mean the acceptance of a part performance of the repairs if the contract is an entire one, inasmuch as his re-entry is in the exercise of an independent right which he surely is not called upon to forego.

With respect to the extent of the plaintiff's participation in the deal, George Thompson and J. T. Hunt say that they closed with the Millings practically on the terms of their last offer to the plaintiff; but I cannot say whether this refers to the $20,000 proposition with the grain thrown in, or to the $20,000 proposition without the grain thrown in, of which there is some evidence, as I said, but which it appears the plaintiff did not report. George Thompson says on the same point, evidently referring to the delay: "I cannot say that the plaintiff's efforts induced me to buy. If the matter had been left entirely to him, I think it would have had the opposite effect." And J. T. Hunt says, "The plaintiff's efforts did not contribute to the sale, s far as I know."

But, whatever part the plaintiff may have taken in the negotiations, I hold, for the reasons stated, that he is not entitled to recover.

There will be judgment for the defendants, with costs.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 13TH, 1908.

TRIAL.

LUXFER PRISM CO. v. MACLEOD.

Contract—Sale of Goods to be Manufactured—Delay in Delivery—Destruction of Property for which Goods Required—Time—Tender—Impossibility of Performance.

The plaintiffs sued the defendant for refusing to accept 11 areas of multiprisms and blanks which they alleged had

been ordered by writing dated 24th August, 1906, and claimed $692.85.

The defence in substance was that the plaintiffs were not only to deliver but also to install the goods within a certain time, which was stated first as "on or about 1st November, 1906," and in the alternative as "a reasonable time," and that they failed to do so; also that it was a condition to be implied by the nature of the contract that the hotel in connection with which the goods were contracted for, should continue to exist at the time the said goods were delivered, and that the hotel was destroyed by fire on 19th November, 1907, before such delivery was made.

There was also a reply to the effect that the concrete bearings for the support of the areas were never made ready by the defendant.

T. S. McMorran, Regina, for the plaintiffs.

A. Ross, Regina, for the defendant.

PRENDERGAST, J.:—The writing in question is an order taken at Regina on 24th August, 1906, by E. A. Taylor, the plaintiffs' agent. After giving the size and other details of the areas, it proceeds as follows: "Above to be installed complete by the Luxfer Prism Company . . . Concrete bearings and walk to be made ready to receive glass by me," etc; and is signed "D. D. Macleod."

The areas were ordered in connection with the Windsor Hotel, the object of such devices being to furnish light to the basement of the buildings adjoining which they are laid down, and, incidentally, to protect the openings over which they are placed from the effects of the weather.

As to the time within which the contract was to be performed, the writing says nothing. The defendant says that it was to be between 15th October and 1st November at the latest, and J. D. Macleod, who was the manager of the hotel, mentions only the one date, 15th October, but is unable to say when it was so agreed upon. Taylor states, on the other hand, that nothing was said as to a date, but that the assumption all along was "before cold weather that fall," and later he adds, "It was to be that fall." I accept Taylor's version, which, besides being reasonable, seems more probable in the light of the subsequent conduct of the parties. It may also be here remarked that the frames of the areas re-

quired to be cemented in the walk, which could not well be done if the weather was cold.

Taylor at once gave the contract for the making of the iron frames to Reid Bros., a firm of iron founders of Regina. The glass blanks were to be shipped from Toronto, the plaintiffs' place of business, and the multiprisms from Montreal, where some of the plaintiffs' goods were manufactured. Reid Bros. were to set the glass when received and lay down the areas complete in the sidewalk.

In the course of a few weeks the cement sidewalk in front of the hotel, which was not commenced at the time of the agreement, was completed, and the contractor for that work, Nelson, had left in it the proper openings with bearings to receive the frames, according to instructions from Taylor himself. I find that this was all completed in October. Referring to the provision that the concrete bearings and walk were to be made ready by the plaintiffs to receive the glass, Taylor says distinctly that he undertook to attend to that part for the defendant. He says: "The walk was to be made ready by me. . . . I took upon myself to give the contractor the dimensions, to protect Mr. Macleod and myself. I was there after the walk was completed. The bearings were finished." The plaintiff, moreover, says that Taylor stated to him that the openings of the areas were all right.

The agreement having been entered into on 24th August as stated, the last days of that month passed by, and so did all of September and of October and the first days of November.

On 10th November the defendant, having inquired several times about the progress of the work from Reid Bros., and having been told that they did not even know that the glass prisms and blanks had yet been shipped to them from the east, wrote to the plaintiffs at Montreal the following letter: "Yours of the 20th of September, announcing that you had received my order (to hand). I have waited with prolonged patience for the installation of the same. The weather is cold. We are without protection, and it means the burning of considerable more fuel than should be, i.e., if you had shipped as agreed. Messrs. Reid Bros. say they have no intimation of shipment."

To this letter the plaintiffs replied from Toronto by letter of 14th November, saying: "We regret that the glass factory delayed shipment beyond the date agreed on with us.

We have a bill of lading shewing that the prisms were shipped on 23rd October, and we trust the delivery will be made to you within the next few days."

It is to be noted that this says nothing of blanks.

On 19th November the Windsor Hotel was completely destroyed by fire, and the sidewalks were covered with a considerable quantity of brick from the crumbled walls and other débris, and so remained until about 22nd December, when they were cleared.

After the fire, nothing seems to have passed between the parties until 12th December, when the plaintiffs sent to the defendant a bill for the goods, to which the latter replied on 22nd December as follows: "Your invoice dated the 12th inst. received. If it had not been for the fire at my hotel, I would have fuel account against you for almost the amount of the invoice. You had agreed to deliver some months ago. I am unable to accept delivery, as we have no place to put them. I regret that I am unable to utilize."

This was followed by 3 other letters, the last of which was dated 11th January—the trend of them being, on the defendant's part, that the frames were to be placed in in October, that the hotel was burnt, and that he had already cancelled the agreement—and, on the plaintiffs' part, that the goods were specially manufactured for him, being of special size, and that they held him to the contract.

From 11th January to 5th March there was nothing at all done, but on the latter date William Cowan, the manager of the company, came to Regina from Toronto, and asked the defendant to accept the goods, which the latter said he would not do. In April, Cowan again saw the defendant, told him that everything was complete, and again asked him to take delivery, which the other again refused.

Now, up to what stage had the work progressed at the time of the fire? When were the areas complete? (This last question does not refer to the installation, which was never done).

Taylor had gone away a short time after the date of the order, and, as already stated, the whole of the work had been left in the hands of Reid Bros.

James Reid says: "The order was pretty well on at the time of the fire; that is, 7 or 8 areas were then ready to go in the sidewalk; they had glass in them. The others had not got glass in; that was the ones with the blanks. The

frames were completed before we had the glass. I think the prisms were here in good time. At the time of the fire, I think we had not the blanks in yet; the blanks were then yet in transit. After the fire we did nothing more. In March and April, when Mr. Cowan made the tender, the work was not complete. In March last, the multiblanks were not yet in the frames." He also says that sometimes they put in the glass after the frames were laid down, but adds that he does not think they could have done so in March, on account of the cold.

There is nothing in James Reid's evidence to shew when the blanks were received. Nor can William Cowan, the manager at Toronto, from where the shipping was made, swear when these blanks were shipped. To the question: "How soon after you received the order?" he answers, "Well, it might have been months, or something like that." On being asked what is the nearest he can get to it, he says: "Oh, I have not any idea without looking up." It appears, however, that the blanks were here in March and April, although, as stated by Reid, not yet set in the frames.

Now, whether the time contemplated at the outset was expired or not on 19th November, I draw the conclusion, from the defendant's letter of 10th November, and from the fact that he did not cancel on receipt of the plaintiffs' letter of 14th November, that he allowed an extension of the time at least by a few days, and, before that time passed by, the fire occurred. After the fire, and up to 22nd December, the frames could not be installed on the sidewalks on account of their being covered with débris, and it was the defendant's duty to clear them. I hold, in other words, that, by virtue of the extension of time, the plaintiffs had yet a few days after the fire to install the areas on the walk, and that during those few days they could not make an installation on account of the condition of the sidewalks, for which the defendant was responsible.

But it is surely not enough for the plaintiffs to shew that through the defendant's actions or omissions they were made unable to perform a particular part of the contract, especially in the very last stages of it. They must shew, at all events, that they performed such part of it as it was in their power to perform, which they have not done. In March and April, 1907, when William Cowan interviewed the defendant, he did not shew him the areas; the evidence is rather to

the effect that the blanks were not yet set in the frames; and I consequently hold that there was no tender at that time. But, even if there was a tender at either of the latter dates, I find that at the expiration of the time contemplated by the parties, say one week after the fire, not only had the blanks not been put in the frames, but they probably had not even been received by Reid Bros., and that consequently the plaintiffs failed to perform within the time contemplated that part of the agreement with respect to which the defendant's co-operation was not necessary.

The contract was to supply goods and install them. The defendant's failure to clear the sidewalk made it impossible for the plaintiffs to do the installation; but they cannot recover unless they have supplied the goods or tendered them in proper condition, which I find they did not do during the time agreed upon, nor in fact at any time up to the day of trial.

The defendant also relies on Taylor v. Caldwell, 3 B. & S. 832, and Appleby v. Miles, L. R. 2 C. P. 651, as well as on Krell v. Henry, 72 L. J. K. B. 794, and other cases of the class generally known as the Coronation cases, which were decided on an extension of the principle laid down in the first two just cited.

In Krell v. Henry, however, in which the agreement was for the use of a hall for a concert, the judgment was more on the ground that the performance was impossible, the hall having been burnt down before the date fixed for the concert —while in the present case it cannot be said that the burning of the hotel made it impossible (even though it made it useless) to install the areas in the walk. With regard to the Coronation cases, I believe that they come nearer to the present one; but I would say that in none of them do I find that when the "conditions or state of things which the parties contemplated" ceased to exist, the contract had been in part executed. I would further observe that in all those cases the contract was declared to be not void ab initio—which, if the contract had received a commencement of execution, might perhaps have left room for the granting of a quantum meruit for goods or services up to the time that the conditions contemplated ceased to exist. It is, however, unnecessary that I should further dwell upon these cases in view of the other grounds on which I have based my decision.

There will be judgment for the defendant with costs.

YUKON TERRITORY.

CRAIG, J. JUNE 9TH, 1908.

SINGLE COURT.

REX v. HARRIS.

Criminal Law—Vagrancy—Prostitute—Conviction not Stating that Accused was Asked to Give an Account of Herself—Criminal Code, sec. 238 (i)—Conviction Following Words of Statute—Information—Plea of Guilty—Waiver of Objections—Form of Information—Reference to Repealed Statute—Surplusage.

Motion by Marie Harris, the defendant, upon the return of a certiorari, to quash a conviction made by the police magistrate for the city of Dawson.

The information laid was in the following words: "The information and complaint of Allan A. McMillan, Sergeant, Royal North-West Mounted Police, at Dawson, Y.T., taken this 18th day of May, in the year 1908, before the undersigned, a Judge of the Territorial Court of the Yukon Territory, having the criminal jurisdiction vested in the police magistrate at Dawson, in the Yukon Territory, that on the 17th day of May, 1908, and for the space of 6 months previous thereto, one Marie Harris, being a common prostitute or night walker, wanders in the public streets and highways at Dawson, and does not give a satisfactory account of herself, being thereby then and there a loose, idle, and disorderly person or vagrant, contrary to section 207 of the Criminal Code of Canada, sub-section (i)."

The conviction was in the words following: "Is convicted before the said undersigned for that she, the said Marie Harris, at Dawson, in the Yukon Territory, on the 17th day of May, 1908, and for the space of 6 months previous thereto, being a common prostitute or night walker, wanders in the public streets and highways of said Dawson and does not give a satisfactory account of herself" (and following the words above quoted in the information). Then—"She, the said Marie Harris, having pleaded guilty to the said offence, adjudged for her said offence to be imprisoned for the term of one month."

George Black, for the defendant.

J. B. Pattullo, for the Crown.

CRAIG, J.:—Two objections are taken to the conviction: one is that sub-sec. (i) of sec. 207 of the Criminal Code does not now exist, 207 relating to the sale and distribution of obscene literature. That certainly is not the offence aimed at in the present information. What occurred was that the person drawing the information, namely, the clerk of the police court, used the Revised Statutes or Crankshaw's Code as consolidated before the late revision, ch. 146, and the offence aimed at is there set out in sec. 238 and not 207 as in the old Act, and it is, as under the former Act, sub-sec. (i).

I will deal with this first objection now. I do not think it is material. It is a mere surplusage in any case, and is a defect in form which may be cured by the statute, and which I could amend now.

The other objection is a more serious one, namely, that the conviction does not state any offence, in that it omits to set out that the accused was asked to give an account of herself. The case of Regina v. Levecque, 30 U. C. R. 509, is an authority which gathers together most of the cases decided before on this question. The judgment of the Court delivered by Wilson, J., then, I have already referred to in a judgment of my own in the cases of Rex v. Barge and Rex v Benoit, decided in October, 1902, before the publication of the Western Law Reporter. I fully concur in all the reasoning of that learned Judge, and I may repeat what I then said: "There are three elements which constitute this offence, and all three of them must be proved: first, that the woman is a common prostitute; second, that she was wandering in the public street; and third, that she did not give a satisfactory account of herself: see Paley, p. 131, 7th ed." The woman must be asked to give a satisfactory account of herself before she can be arrested as a street walker. The demand must be made upon her for a satisfactory account before the arrest. This view of the law is to a certain extent varied by the judgment of Wilson, J., in the case of Arscott v. Lilly, 11 O. R. 153, where it was held that if the parties were caught in the act, even though the section provides for a satisfactory account, no demand for an account was necessary as a prerequisite to the arrest. But in that case he held specifically, and he was supported by the full Court, that in the case under sub-sec. (i) the demand must be made. His words are: "These unfortunate people shall not be inter-

fered with unless wandering in those named places, and not even then unless they fail to give a satisfactory account of themselves, and it is quite manifest that they may be able to give a very satisfactory account why they are found at the time in such places."

I would also refer to the case of Regina v. Arscott, 9 O. R. 541, and the language of Mr. Justice Rose in that case: "These authorities and the others cited by Wilson, J., in Regina v. Levecque have, so far as I know, not been overruled. They are given directly upon the section in question, and, apart altogether from these authorities, I am of opinion that the section itself is sufficient authority for the judgment which I am now giving. The qualifying clause is not an exception the burden of the proof of which is thrown upon the defendant; but it is a substantive part of the section and of the offence." It would not be contended for a moment that this unfortunate class of people are not to walk in the streets. They have as much right to walk in the streets as any other person, provided they are not so walking for immoral purposes, and to ascertain their purpose the Act calls upon the officer making the arrest to demand the purpose of their being in the street. It limits the right of this class of people to walk in the streets, inasmuch as any police officer, knowing what their character is, may accost them and demand an explanation which he is not at liberty to demand of any other citizen. But, subject to that, they have the same rights in the streets as anybody else. The Act does not say that the policeman shall make a formal demand for explanation, but, by implication and by necessary implication, it seems to me that it is a positive thing which the officer must do before he puts the person charged on her defence. I am inclined to think that any words which shewed to the woman that the policeman was watching her and required her to account for her presence, would throw upon the woman the burden of telling the policeman what her business in the street was; but certainly something must be said to call upon the woman for a defence, that is, the defence of giving a satisfactory account. I am not, of course, bound by the authorities of any other Court but the appellate Courts of England and our own Supreme Court, unless the reasoning satisfies my judgment. But I am satisfied that natural justice warrants the finding by the Court in Regina v. Levec-

que. It is impossible to think that these women are called upon by the statute to address every policeman they pass and to explain their business in the street. Common sense would indicate that a policeman suspecting them must charge them with being improperly in the street and call for an explanation. Justice, it seems to me, would not be satisfied by any other interpretation of the law, and that is the settled law by the authorities both of Ontario and England. Then it is answered to this that the charge is drawn in the very words of the statute, and that sec. 723 of ch. 146 cures this defect. The words of sub-sec. (3) are: "A description of any offence in the words of the Act, or any order, by-law, regulation, or other document creating the offence, or any similar words, shall be sufficient in law." A precisely similar enactment is contained in sec. 39 of 42 & 43 Vict. ch.49, of the English statutes, and that sub-section has been interpreted by English authorities.

In considering this case I have read a good many Canadian authorities, particularly the cases of Rex v. Code, 7 W. L. R. 815; The King v. Young, 12 Can. Crim. Cas. 109; The King v. Leconte, 11 Can. Crim. Cas. 41. In this last case the charge was that the accused was the keeper of a disorderly house, bawdy house, or house of ill-fame or house for the resort of prostitutes, in the city of Brantford. The motion was heard before a Divisional Court—Meredith, C.J., and Teetzel and Mabee, JJ. There Meredith, C.J., said: "It seems to me that this offence is properly charged, as it is in the very words of the enactment." And Moss, C.J.O., in his judgment in appeal used almost the same words. He said: "Then, as regards the objections that the offence is not properly set out, or that a double offence is stated, or that no offence is disclosed, the conviction is under sec. 207 (j) of the Criminal Code, and both the conviction and the demand follow the language of that section, and that is all that is required; sec. 846 (2), which is the similar section in the Code before revision." In reading the judgments of these learned Judges I do not find any reference to the case of Smith v. Moody, [1903] 1 K. B. 56, although that case is cited in the argument of Mr. Mackenzie; nor to the case of Cotterill v. Lempriere, 24 Q. B. D. 639, which I will consider later. I have also read the case of Ex p. Hilchie, in the same volume, p. 85.

In considering the necessity for setting out in the conviction the fact that the accused was asked to give an account of herself, it is with very grave doubt, a doubt which has been expressed by the Judges in the case of Smith v. Moody, and the other case of Cotterill v. Lempriere, that I come to the conclusion which I am forced to come to in this case in spite of sub-sec. 3 of sec. 723. The words of sub-sec. (3) relate simply to the description of the offence. Such a description, the section says, is sufficient in law. Does that mean that all the old rules as to particularity in statement are done away with? As it is said in the case of Rex v. Cormack, it is not sufficient to indict a man as a thief without proper particulars and facts. Very many illustrations of this are given in the authorities. The wording of sub-sec. (i) of sec. 238 is only giving the offence a name. It describes in general terms and in alternative words what would constitute that offence merely as a description. The elements which go to make up the offence are not set out in the section. If the person accused were guilty in the exact words of the section, she would not be guilty of any offence in law. If she, being a prostitute even and wandering on the streets, did not approach a policeman and give an account of herself, that would not be an offence. So she might very well plead guilty to the words used in the information and still not be guilty of any offence at law. The defects are more than defects in particulars. I think that might be supplied. But it is an essential ingredient of the offence that a request for an explanation should first be made. Paley, 7th ed., in referring to this very sub-section, says: "In the use of statutory forms in general it will be expedient to attend to the following points which will be more fully illustrated in the sequel, first, that where a blank is left for inserting the offence the same accuracy is required in the description of it as in other cases; secondly, that although, as is often the case, the Act directs that no conviction under this Act shall be set aside for want of form or through the mistake of any fact, circumstance, or other matter, provided the material facts alleged be proved, yet, notwithstanding these or the like words, every material fact must be alleged, and the omission, if any, is not aided by reference to such clause." Quoting from Paley again: "Another maxim is that all the facts necessary to support the proceeding be expressly alleged and not left to be gathered by in-

ference or intendment." Lord Denman in the case of Fletcher v. Calthorpe, 6 Q. B. 80 and 891, said: "Proceedings in cases of this nature, which are to deprive a man of his freedom in a summary way without letting him be tried by his peers, are always construed strictly, and never supply by intendment a matter which does not appear on the face of them."

There seems to me to have been great conflict of authority in the various cases upon the setting aside of summary convictions, some of the Judges leaning to strictness in the consideration of them and others being disposed to support the conviction if possible. Paley endeavours to reconcile these conflicting authorities, and says: "The cases which carry the doctrine of strictness the furthest will be found to relate to matters affecting the jurisdiction; such are the style and title of the magistrate, the date, the locality of the fact alleged, and more especially the description of the offence, in the essential part of which no omission or defect can be supplied by implication. On the other hand, those things which allow of a favourable intendment are mostly such as regard only the form of the proceedings. It is, however, to be remarked, as a proper caution in drawing any general conclusions from opinions or dicta which seem to admit of license in the wording of convictions, that these expressions, when examined with the text, will be found to apply not to the substance or contents of the convictions, but only to the use of certain technical forms which may be dispensed with consistently with the utmost precision in the statement of fact."

In considering this very sub-section, Paley refers to several authorities at p. 197, 7th ed., and particularly to the case which I have already mentioned of Cotterill v. Lempriere. But the authority by which I think I am bound and with which I agree is the case of Smith v. Moody. That was a conviction under the Conspiracy and Protection of Property Act, 1887, 38 & 39 Vict. ch. 86, sec. (7) of which is as follows: "Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority injures his property, shall, on conviction thereof by a court of summary jurisdiction, be liable," etc. The defendant was convicted in the very words of the statute. The appeal was

argued before Lord Alverstone, C.J., Wills, J., and Channell, J., who all concurred in the finding. The conviction was quashed because it did not specify what property of the respondent had been injured. This, it seems to me, is going very much further than I am going in the present case. The conviction described the offence in the words of the Act, and the doing of what was prohibited by the Act as described by the Act was an offence. It was simply that the particulars of the property alleged to have been injured were not set out in the conviction. This is surely going a long way beyond my finding in the present case. In the case I am considering the omitted part is the essential element of the offence, as I have already said; there can be no offence unless these words which are omitted are embodied by implication in the statute, and evidence given that these implied words have been conformed with by the officer. That is essentially different from the present case in the quality of the defect. In the case of Smith v. Moody it was a simple omission of description of property. In the case I am considering it is an absolute want of something essential to the constituting of the offence. Lord Alverstone said in that case, in referring to this very sec. 39 of the English Act, which provides that a description in the words of the Act shall be sufficient, that on first considering the question he thought that the defect had been cured by it, but on a more serious consideration he decided that it had not. He says: "I have come to this conclusion with some reluctance, because I have very little doubt that actual injury to the respondent's property was proved; but in giving our decision we have to consider how far it may have a bearing on other proceedings." Wills, J., concurred fully and said: "I think that sec. 39 of the Summary Jurisdiction Act of 1879, which provides that it is sufficient to describe the offence in the words of the statute creating the offence, cannot be supposed to have been intended to break down the very important rule which has prevailed now for at least 300 years in the administration of justice with respect to the sufficiency of particulars in a conviction. I do not think for a moment that it was intended to relieve persons who had to draw up convictions from inserting anything which was necessary as an ingredient of the offence of which the particular defendant has been found guilty. When one comes to the description of the offence

itself, then it is quite sufficient if it is described in the terms of the statute, however general they may be. At the same time the old rule must prevail that whatever is necessary to shew that the person convicted has done something which brought him within the words of the statute, must still be specified. It is not that there is any insufficiency in the description of the offence itself. The description of the offence follows the words of the statute; but there is insufficiency with respect to the ingredients of the offence which the appellant has committed and for which he has been convicted. I think specific information as to the injury to the property ought to have been given in the conviction." Channell, J., used language very much to the same effect. I might also refer to the language of Lord Coleridge, C.J., and Lord Esher, M.R., in Cotterill v. Lempriere. By these last cases I think I am bound, although they do not agree with the decisions in the Courts in Ontario which I have previously cited; but I think they do agree with the views expressed by Hunter, C.J., in Rex v. McCormack, 7 Can. Crim. Cas. 135, and with the judgment in Rex v. Code, and also with the views expressed by Taschereau in his Commentary on the Code and on sec. 611 at p. 675 et seq. In this connection the case of In re Donnelly, 20 C. P. 165, is a strong one in support of my finding.

It was contended that the plea of guilty, without objection to the form of the information, waived the objections now taken. I do not think so. The plea was only to the information as laid, and I have already held that that information did not of itself constitute an offence; that a person might very well plead guilty of those words without being at all guilty of the offence covered by the statute, and upon this point I would also cite Paley, 7th ed., p. 116, where he says: "The confession goes no further than the matters charged. So if a fact be penal only under certain circumstances and those are omitted in the charge, the conviction is bad notwithstanding it is stated that the defendant fully acknowledged the premises to be true as charged, and did not shew any sufficient cause why he should not be convicted thereof."

The judgment will be that the conviction be quashed and an order of protection to all parties without costs.

THE

Western Law Reporter

VOL. VIII. TORONTO, AUGUST 15, 1908. No. 8.

MANITOBA.

MACDONALD, J. APRIL 29TH, 1908.

SINGLE COURT.

HALSTED v. HERSCHMANN.

Attachment of Debts—Moneys Payable at a Particular Time —Written Instrument Acknowledging Debt—Form of—Promissory Note — Moneys not Attachable before Maturity.

Stated case:—

1. This is an action commenced on 18th November, 1907, by the plaintiff to recover from the defendant the sum of $3,382.05 and interest, as moneys due under the terms of an agreement for sale of land.

2. On 9th March, 1908, the plaintiff recovered judgment against the defendant in this action.

3. On 19th November, 1907, the plaintiff obtained from the Referee of this Court, Winnipeg, a garnishing order in the following words: "It is ordered that all debts, obligations, liabilities due or to accrue due from the above named garnishees (Messrs. Wilton & McMurray), or any of them, to the above named defendant by attaching the necessary judgment —to be recovered by the above named plaintiff against the above named defendant in the Court of King's Bench to the amount of $3,500;" and the said garnishing order was on or about the 19th November, 1907, served on Messrs. Wilton & McMurray, of Winnipeg, barristers.

4. On or about 20th June, 1907, the defendant advanced to the said Wilton & McMurray the sum of $500, and at the

time of the said advance received from Wilton & McMurray an instrument in the following form: "Winnipeg, June 20th, 1907. Received from P. Herschmann, Esq., the sum of five hundred dollars advance to be repaid at expiration of 9 mos. Wilton & McMurray."

5. On or about the day of March, 1908, the said garnishing order was altered by changing the words "debts, obligations, liabilities due or to accrue due from the above named garnishees" to the words "debts, obligations, liabilities due or accruing due to the above named garnishees," and the words "by attaching the necessary judgment" altered to the words "be attached to answer a," such changes being made with the intention of applying to the Referee to confirm the said changes and to initial the same in the said order, but the learned Referee, on application for that purpose, refused to confirm the said change or initial the said order.

6. Assuming for the purposes of argument that the defendant on 16th March, 1908, assigned the said instrument by indorsement on the back thereof for value to one Hugo Herschmann, and that notice of such assignment was on 18th March, 1908, duly given to Messrs. Wilton & McMurray.

7. The moneys due under the said instrument referred to in paragraph 4 hereof became due on the 20th March, 1908, or on 23rd March, 1908, if the same is a negotiable instrument.

The following questions are submitted for the opinion of the Court:—

(a) Is the garnishing order as originally framed sufficient for the purpose of attaching the moneys so falling due on the 20th or 23rd of March, 1908?

(b) Does the change in the order invalidate the same?

(c) If the change is a clerical error which the Court can rectify, would the order take effect from its original date or from the date of such rectification?

(d) Is the said instrument referred to in paragraph 4 hereof a negotiable instrument, and, if so, would the garnishing order, if valid as originally issued, be sufficient to bind the moneys in the hands of Wilton & McMurray, assuming the said instrument to have been negotiated to a holder in due course on 20th September, 1907?

A. B. Hudson, for plaintiff.

H. A. Burbidge, for defendant.

MACDONALD, J., declared, in answer to question (d), that the instrument referred to in paragraph 4 of the stated case is a negotiable promissory note, and as such is not attachable by garnishment proceedings, nor are the moneys payable according to the tenor of the said instrument attachable by garnishment proceedings before the maturity of the said instrument or promissory note.

As to the remaining questions submitted in the stated case, it was declared unnecessary to make any answer, as all the issues in the stated case were disposed of by the answer given to question (d).

Costs of and incidental to the stated case to be paid by plaintiff to defendant.

MANITOBA.

MATHERS, J. MAY 19TH, 1908.

CHAMBERS.

THEO NOEL CO. v. VITÆ ORE CO.

Discovery—Inspection and Analysis of Medical Preparations —Passing off Goods on Public.

This was an action for an injunction restraining the defendants from passing off upon the public certain medicinal preparations sold and manufactured by them so as to deceive the public into the belief that they were the medicinal preparations of the plaintiffs. The defendants alleged that the plaintiffs were carrying on a fraudulent trade in their preparations, and a motion was made before the Referee in Chambers for an order that the plaintiffs should deliver for the defendants' inspection and for the purposes of an analysis all the medicinal preparations used by the plaintiffs. It was shewn that the plaintiffs had advertised their preparations as being able to cure cancer, dyspepsia, Bright's disease, and various other diseases. The defendants' contention was that they should be in a position to say whether the plaintiffs' preparation would do this.

The Referee dismissed the motion, and the defendants appealed.

H. P. Blackwood, for defendants.

G. D. Minty, for plaintiffs.

MATHERS, J.:—I am not satisfied that an analysis of the contents of the particular packages produced would materially assist the defendants, or that it would serve any purpose that would not be as well, if not better, served by the analysis of what may be freely purchased from the plaintiffs in the market.

The packages in question, although produced for all purposes, still remain the property of the plaintiffs. An analysis would destroy, or at least change, the form of the contents. This is a liberty that should not be taken with the property of a litigant, unless for the purposes of justice it is absolutely necessary to do so.

The granting or refusing the order was in the discretion of the Referee. In my opinion, no case for interfering with his discretion has been made out.

The appeal must be dismissed with costs in the cause to the plaintiffs in any event.

ALBERTA.

BECK, J. JUNE 26TH, 1908

CHAMBERS.

CUMMINGS v. SEMERAD.

Mortgage—Judgment for Sale of Land—Sale under Direction of Clerk of Court—Invalidity—Refusal of Motion to Confirm — Necessity for Approbation of Judge — Conditions of Sale—Advertisements — Consent of Prior Incumbrancer — Reserved Bid — Conduct of Sale—Leave to Bid — Description of Land — Title — Costs.

An application by the plaintiff to confirm a sale to one U. S. Bolster of all the right, title, and interest of the defend-

ants Semerad and Mikota in certain lands sold by public auction and knocked down to Bolster.

H. H. Parlee, for Cummings.

O. M. Biggar, for Bolster.

No one for defendants.

BECK, J.:—I find that the judgment directed that the sale take place "under the direction of the clerk of this Court at Edmonton." The form of judgment containing these words was drawn up by the plaintiff's solicitor and consented to by the solicitors for the other parties, and then approved by a Judge. I have no doubt that if the learned Judge's attention had been called to these words, he would have eliminated them.

Where a case arises for an order that land be sold, there are, apart from a sale by private contract sanctioned by a Judge, two methods which may be adopted: (1) a sale "by proceedings altogether out of Court;" or (2) by auction or tender "with the approbation of a Judge" (Rules 450, 451, Jud. Ord., C. O. 1898 ch. 21; English Order LI., Rules 1a and 3). The sale, unless directed to be made out of Court, should be directed to be made "with the approbation of a Judge:" Seton on Decrees, 6th ed. p. 333; Yearly Practice, 1908, notes to O. LI., Rule 3.

The result of the direction in the judgment that the sale was to be "under the direction of the clerk" appears to have been that the clerk settled the conditions of sale and the advertisement, that no attempt was made to get the prior incumbrancer to consent to the sale, and that no reserved bid was fixed.

There is no provision in our Judicature Ordinance or Rules, or in the Supreme Court Act, conferring any of the powers or duties of a Judge upon the clerk or any other person except the District Court Judge in certain cases.

In proceeding under a judgment or order directing a sale, it is the duty of the Judge, and under our practice this duty ought not to be delegated, to determine who shall have the carriage of the sale: and to ascertain the particulars of the property to be sold; what incumbrances there are affecting it; whether the incumbrancers, if any, will consent to the sale; the nature of the title; what, if any, special conditions are

necessary; and the best method of sale: Daniel's Ch. Prac., 7th ed., p. 875.

I have examined the entire file of papers in the action in the clerk's office, with the view of seeing how, if at all, these matters were dealt with by the clerk, while doubting whether, even in view of the words quoted from the judgment, he had any authority to deal with them.

(1) The conduct of the sale. In all probability this was not considered and went as a matter of course to the plaintiff's solicitor. The conditions of sale (which it would appear were not approved by a Judge) give the plaintiff leave to bid. It is contrary to the practice of the Court to give leave to bid to the party having the conduct of the sale: Domville v. Berrington, 2 Y. & C. 723; Verrall v. Cathcart, 27 W. R. 645.

(2) The particulars of the property to be sold. These particulars are required for the purpose of drafting the advertisement. The advertisement describes the property offered for sale as follows: "All the right, title, and interest of the defendants Charles V. Semerad and Frank Mikota in the east half of section 5, township 53, range 25, west of the 4th meridian. The defendants Semerad and Mikota are the holders of an agreement for sale of the above described property bearing date 5th December, 1905, wherein one Ulysses S. Bolster is vendor and the defendants Semerad and Mikota are purchasers, for the price or sum of $4,640, on account of which has been paid the sum of $2,402.50. The interest of the said Semerad and Mikota is further subject to the disputed claims of the following persons, who claim as purchasers under agreements for sale made by the said Semerad and Mikota for the sale to them respectively of the subdivided parcels of land set opposite their respective names." Then follow the names of 8 several persons, with the description by reference to lots and blocks of certain parts of the land.

Now, I have ascertained that the half section in question, containing 320 acres more or less, is situated about 6 miles westerly from the centre of Edmonton; that it is known and marked on published maps as "St .Elmo Park;" that it has been subdivided into 6 blocks, and these blocks into lots containing an acreage varying from a little over 3 to a little over 7 acres; that the property is intersected by a line of the Canadian Northern Railway. These facts, together with infor-

mation on a number of other points, ought to have been shewn by an affidavit and in the advertisement. (3) What incumbrances affect the property? I find no abstract of title among the papers. It is only a matter of supposition, as far as appears from the papers on file, that the title is in Bolster subject to his agreement in favour of the persons mentioned in the advertisement.

(4) Whether the incumbrancers will consent to the sale. Bolster ought to have been asked to consent to the sale subject to a reserved bid or upset price sufficient to cover the balance owing him. I am satisfied he was never asked, and that, had he been asked, he would have consented.

I think, too, that it should have been ascertained on what terms the 8 sub-purchasers bought the parcels they claim, and what, on the assumption that they could retain the parcels, still remained owing by them, and that the substance of this information ought to have been contained in the advertisement, accompanied by a distinct statement of what I infer was the intention that the purchaser would, if the sub-agreements were valid or validated, be entitled to the moneys still unpaid upon them: see Daniel, pp. 876-7.

(5) The nature of the title. This I have already commented upon.

(6) What special conditions, if any, were necessary. As far as the clerk is concerned, I am under the impression that he gave this question no consideration. There is nothing to shew whether the question of a reserved bid or upset price was considered. I notice one extraordinary provision, namely, that the balance of the purchase money over 10 per centum of the price is to be paid within 2 days.

(7) The best method of sale. I suppose that a sale by public auction was the best method; but I think I can assume that no other method was considered. The judgment gives no direction as to the method of sale. Furthermore, it would appear that no directions to the auctioneer were issued, and, inasmuch as it appears on this application that there was at least one other bidder besides Bolster, and no bidding paper is returned by the auctioneer, it would appear that he was neither furnished with a bidding paper nor made use of one, or of any form corresponding thereto, other than his own private auctioneer's book of record of sales. The sale, under all the disadvantages of the irregularities I have pointed out, was proceeded with.

The auctioneer's affidavit of the result of the sale states that Bolster was the highest bidder; that his bid was $3,100; that the auctioneer, immediately after knocking down the property to Bolster, requested him to pay to him $310, being 10 per cent. of the purchase price, and to sign the contract to purchase affixed to the conditions of sale; and that Bolster refused to do either.

In answer to the application, Bolster swears that the reason he refused to pay the $310 and to sign the contract was that he supposed that the balance owing to him would be deducted from his purchase price, and his refusal followed immediately upon hearing from the auctioneer that this was not so. Affidavits of 5 other persons were filed on his behalf to the effect that the deponents were present at the sale and were fully under the impression that whatever was bid a clear title would be given. Affidavits in reply were filed, which, taking also into account the probable value of the land, almost convince me that Bolster is not in good faith in refusing to carry out the sale. I am, however, left in doubt, and, owing to what I consider very grave irregularities in the proceedings leading up to the sale, and the very unsatisfactory way in which the property was advertised for sale, and especially the fact that the plaintiff's agent, as appears by his affidavit filed upon the application, bid $3,000 for the property as advertised, that is, the interest of Semerad and Mikota, subject to the disputed claims of the 8 sub-purchasers, I think justice can best be effected by my refraining from deciding the question of mistake on affidavit evidence, and by declining to confirm the sale to Bolster. If he was in fact under a misapprehension, I am satisfied not only that there was nothing on the part of the plaintiff or his solicitor to lead him in to the mistake, but, on the contrary, that he was so fully aware of the facts and circumstances relating to the property and the advertisement for sale, that he ought to have known that it was intended that the purchaser would have to assume payment of the balance due to himself. I will not hold him to the sale if he still refuses to carry it out, but I think he should pay the costs of this application, and probably all other costs occasioned by the abortive sale, but I shall reserve the question of the costs for further consideration in view of what I am about to say.

If the solicitors for the defendants who have appeared do not object, I will sanction a sale to the plaintiff for $3,000 if he is still willing to pay that sum.

If they do object, or if the plaintiff is unwilling to pay the $3,000, the property may be offered for sale with the approbation of a Judge. This will enable the proceedings incident to a re-sale to be properly considered, and does not necessarily imply a sale by public auction.

Order to go dismissing the application, reserving the question of costs of the application and the abortive sale.

ALBERTA.

STUART, J. JUNE 27TH, 1908.

TRIAL.

UNITED MINE WORKERS OF AMERICA, DISTRICT No. 18, v. STRATHCONA COAL CO.

Trade Union — Unincorporated and Unregistered Association—Action by—Status as Plaintiff—Individual Members—Breaches of Contracts—Joinder of Causes of Action—Parties—Individual Rights—Master and Servant —Agreements to Mine Coal — Terms and Conditions— Stipulations as to Timber, Water, and Track — Reasonable Interpretation — Industrial Disputes Act, 1907 — Conciliation Boards—Agency.

Action for damages for breach of a contract or contracts, the plaintiffs being an unincorporated association or union and 18 individual members thereof.

H. A. Mackie, for plaintiffs.

J. R. Lavell, for defendants.

STUART, J.:—I had thought at one time of reserving my judgment in this case for the purpose of giving carefully and in extenso my reasons for the judgment that I should give, because it is a matter, I have no doubt, of very great interest to a great many people in the community, and the action has been brought really, I presume, because it is of such general interest, but I do not see that any advantage can be gained by reserving that decision, for the reason that my views in the matter as to the rights of the parties are

quite clear, and I think I can give my reasons for the judgment I am about to give as well now as at any later time.

I may say, in the first place, that my only reason for not dismissing the United Mine Workers of America, District No. 18, from the case and from the record at the very opening of the trial, and my reason also possibly for not dismissing the action as a whole at the opening of the trial, for the reasons I am going to give for dismissing it now, was because I did not wish to leave the impression upon these plaintiffs, who are labouring men and members of the trades union, that their case was being treated unceremoniously or with contempt, and for that reason I have listened, I think, with some patience, not only to the evidence, but to the argument that has been advanced upon their behalf.

There can be no doubt in the world, as Mr. Mackie admitted at the close of his argument, that the United Mine Workers of America, District No. 18, can have no status in any Court as parties plaintiff or as parties to the action at all. It is not alleged in the statement of claim that they are a body corporate, and they are not proven a body corporate. The only persons that have a right to sue in Court are individuals or bodies corporate who are given that right by statute. There is the exceptional case, of course, of trades unions registered under the Trades Union Act. If the United Mine Workers of America, District No. 18, had been registered under the Trades Union Act, they would, according to the decision in the Taff Vale Railway case, no doubt, have been liable to be sued, and I think corollatively entitled to sue in Court. But it is admitted that they are not registered; therefore they are a nondescript body, as far as this Court is concerned, and certainly their claim, as far as this action is concerned, must be dismissed. It is true that Mr. Mackie referred me to certain cases in British Columbia in which actions seem to have been brought against the Western Federation of Miners or certain unions of that organization, but it does not appear from the records whether or not they were registered under the Trades Union Act, and I am inclined to think, from reading the reports, that they were simply after all only representative actions, because a large number of individual plaintiffs were joined, as well as the Federation of Miners, and I do not think that those cases furnish any authority for saying that the United Mine Workers of America, District No. 18, can bring any action or that they have any status in Court. For that

reason, in respect to them the action will be dismissed with costs, if the defendants can get costs out of that organization.

Now, with respect to the individual plaintiffs the position is a more serious one, and there is something more to be said on their behalf. I notice, however, that the statement of claim is very peculiarly drawn. It alleges that the United Mine Workers of America, District No. 18, are a labour organization, and that the other plaintiffs are coal miners, and that they made and executed the hereinafter mentioned agreement, and that up to 27th February, 1908, they were employees of the defendant company and were members of District No. 18 of the United Mine Workers of America. It alleges that in pursuance of an Act Respecting Conciliation and Labour, being R. S. C. 1906 ch. 96, certain differences between the plaintiffs and the defendants were referred to a board of conciliation. I am inclined to think that that allegation is made under a misapprehension, and that the reference was really made to the Act with respect to Industrial Disputes of 1907. Then it goes on to allege, as a result of that reference, that the plaintiffs and defendants entered into and executed a certain agreement, which is set forth and which I need not read. The agreement, however, purports to be between the defendant company and the employees of the company represented by the United Mine Workers of America, District No. 18, and is really an agreement setting forth certain conditions and certain terms by which the employees of the company and the company itself agree to be bound, terms with relation to the rate of payment for mining coal, and particularly the terms in article No. 5, that the company agreed to attend to timber, water, and track. Then the statement of claim says that, in contravention and violation of this agreement, the defendant company did not pay the plaintiff coal miners who were working in the defendants' mine semi-monthly, which was one of the terms of the agreement, but allowed periods of 5 weeks to elapse without paying them; that on 6th February the defendant company reduced the rate of payment to the plaintiff coal miners from 33⅓ cents per car, which was the rate stipulated in the agreement, to 28 cents per car, and that the defendant company refused to pay certain other rates of wages in respect of turning and opening rooms, etc.; that the defendant company, without any just cause or reason, and in contravention and violation of the agreement, particularly of the second paragraph thereof,

discharged certain of their employees, 3 of the plaintiffs; and it goes on to allege that on 25th February, 1908, 3 of the plaintiffs who composed the pit committee referred to in the agreement and the discharged plaintiffs met the pit boss, and, treating him as the agent, I presume, of the defendant company, requested reinstatement for those who were discharged, and that reinstatement was refused; that the defendant company laid off certain of the plaintiff miners in contravention of the agreement; that during the employment of the plaintiff coal miners the defendant company, in violation of the agreement, failed to keep the track in proper repair, condition, and order; failed to drain the mine in a proper manner; and that by reason of this failure the plaintiff coal miners were prevented from doing as much work and earning as much money as they otherwise could and would have done. The statement of claim further alleges that the defendant company failed properly and adequately to timber their mine, so that the plaintiff coal miners had and were compelled to timber their own workings in the mine; that on account of that the plaintiff coal miners were occasioned great loss of time; and it is alleged further that in consequence of these breaches by the defendant of this agreement, the plaintiffs, not saying who particularly, but the plaintiffs generally, have suffered damages thereby; and there is the claim for $90 damages per day since 27th February, 1908, until the date of judgment; another claim for reinstatement of the coal miners in the defendants' mine and another claim in the alternative for damages for $90 a day during the term of the agreement; and there is another claim for additional damages for $978 on account of the failure apparently to keep the track and mine in proper condition and to supply timber.

That is the substance of the statement of claim. I fail to see how, as that statement of claim is drawn, it can be said to set forth the cause of action in any one of these individual cases. It is not alleged that these individual plaintiffs entered into a contract to mine coal for the defendant company except by a very remote inference, from the words that are used, and, before I could give judgment even for the individual plaintiffs, it seems to me that the statement of claim would have to be completely revised so as to contain allegations that the plaintiff John Ordezy and the other plaintiffs separately and individually entered into a contract with the defendant company to mine coal in their

mine, and that on or about 23rd December, 1907, the defendant company agreed that, with respect to those separate contracts made by these individual men, certain conditions and terms should apply by virtue of this agreement which is pleaded here, and that that agreement was made on behalf of each of the individual plaintiffs through persons who were their agents, viz., the persons signing it, Mr. Sherman and Mr. Galvin, and the other persons whose signatures appear. And the revised statement of claim that I have suggested would have to go on and say that those individual contracts were broken by the defendant company in the way, no doubt, that is set forth in paragraphs 9 and 10 of the statement of claim as it stands, which deal particularly with the condition of the mine and the supply of timber. But I fail to see how I could give judgment on such a statement of claim as that unless an amendment were made along the lines I suggest. The rights of all these 18 individual men have been placed in this record in one general statement as if they were a corporation themselves or perhaps as if they were partners themselves, but they are neither a corporation nor partners. Each individual man, when he went into the employment of that company, made a separate contract of his own with that company to mine coal for them, and for breaches thereof, if there were breaches proven, there is no doubt in the world that these men would have been entitled to sue for damages and to recover them if the evidence justified the recovery.

But, even assuming that such a revision of the statement of claim were made so as to contain separate allegations in respect of each of the 18 individual plaintiffs, there is still a question which has been raised by the defendants as to the right of 18 individual plaintiffs to sue in one action for the breach of 18 separate contracts. It is quite impossible, in my view of the case, for the plaintiffs to succeed in their contention that there was one individual contract. The contract is expressed as being made between the defendant company and the employees of the company as represented by the United Mine Workers of America, District No. 18. The particular employees are not mentioned in it; the particular plaintiffs who sue here are not mentioned in it, and it seems to me that it is quite impossible for the plaintiffs to succeed in their contention that this was one contract, a joint contract, because these 18 plaintiffs never did jointly agree to anything with the defendant company. They did

not go in as partners or as joint contractors in any way to mine coal for the company. They went into the employ of the defendant company at different times. They each, when they went into the employ of the company, made a separate contract with that company to mine coal for them, and I do not think that those separate contracts could possibly be considered as turned into a joint contract by what happened on 23rd December, 1907, that is, by this agreement that has been set forth here. The very best that can be taken out of it even for the plaintiffs is this, that on that date certain persons representing them agreed for each of the 18 individuals that the terms and conditions set forth in this paper should govern the contracts which these 18 individual men made and entered into with the defendant company for mining coal. That being so, there being 18 distinct, individual contracts, the result follows that for a breach of each of those 18 individual contracts there would be a separate and distinct right of action in the 18 individual plaintiffs. Now, assuming that the revision of the statement of claim were made that I have suggested, we would still be face to face with the question whether these plaintiffs had any right to join in such an action as this. I have not anything to do with the policy of the law, whether the law is good law or bad law. I have simply to deal with this case under the law as it stands and as I conceive it to be. Under our Rules of practice, Rule 26, the law is that a number of plaintiffs may join in the same action. But I am face to face with the interpretation of that Rule which was made in the House of Lords in the case of Smurthwaite v. Hannay, [1894] A. C. 494, which decides that that applies simply to a joinder of plaintiffs and not to a joinder of different rights of action. There is no doubt that here there are 18 distinct rights of action in these 18 different plaintiffs, and that the decision in Smurthwaite v. Hannay is exactly in point, and the result of it is that those 18 rights of action cannot be joined in one case. The defendants raised this objection, and I think that they were entitled to raise it even as late as they did, in view of the way that the action is brought, not merely by throwing in the United Mine Workers of America, District No. 18, who had no status at all, but by attempting to treat the whole affair as if it were one agreement and one right of action. So that I am bound to say, even aside from the merits of the case, I do feel very much disposed.

and I do intend, to decide this case on this ground of the misjoinder of so many causes of action in one action.

It is true that it might have been inconvenient for each of these 18 individual persons to have brought his action separately. It is true that if they had done so, an application might have been made for consolidating the actions, and, if that had been done, I presume we should have had a proper statement of claim with respect to each man's action, and we should have known what it was he claimed individually; but, in view, as I say, of the way the whole thing has been thrown together, I do not think that I am treating the plaintiffs unfairly at all in insisting upon this point and giving judgment following Smurthwaite v. Hannay. Indeed I do not think I have any power to do otherwise than I am doing when Mr. Lavell, for the defendants, raised the point. The law is there, and I have to administer it as it is. He raised the objection, and it is clearly held by the House of Lords a good objection, and I am bound to follow it.

I would like to say this, however, for the benefit of the plaintiffs, that this does not mean that they are to be forever pestered by this law, even if it is a bad one. The English Rules have been changed, and if we had had the new English Rule which says: "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment;" then the objection that the defendants raised could not have been raised, and the plaintiffs would not have been met, at any rate, by the case of Smurthwaite v. Hannay, upon which I am resting my present decision. There is a possibility that these Rules may be revised and made more conformable to the present English practice, so that it is not a permanent condition of affairs by any means.

But to go to the merits of the case. Supposing I had overlooked this objection and had agreed that these actions might have been brought jointly, or supposing I had had one of these individual plaintiffs here in an action alone, I should come to the conclusion that even then none of these individual plaintiffs could have succeeded. The plaintiffs will, therefore, have the satisfaction of knowing that I am giving judgment upon the merits of the case as well as upon what they may think is a technicality. Even if I had been dealing, I say, with an individual action of one of these plaintiffs for damages for a breach of the contract that they entered into with the defendant company to mine coal, I do not see how they could succeed. Their contract was to mine coal in that mine at so much per car, and, assuming that this agreement of 23rd December, 1907, was applicable to that contract which I speak of—and I think perhaps Mr. Mackie is right in saying that I should think it was applicable, and that the agency was thoroughly established by means of which it was made applicable—what is it that the defendant company agreed to do? All that is stated in that contract is that the company attend to timber, water, and track. Now that is very, very vague, extremely vague. It seems to me that if the plaintiffs, or the individual plaintiff whom I am now speaking of, had desired to insist that this company should make their mine a perfect working machine, to work like clockwork, so that they individually, as part of that machine, should not be delayed for a moment or to the slightest degree in carrying out their contract; if they had wanted to insist that the company must have their timber there on the spot ready for them at every moment, so that there would be no delay, they should have seen that such a stringent stipulation was inserted in the agreement itself. I have to interpret the agreement as it stands, and I have to interpret it in a reasonable way, and my opinion is that the only fair interpretation of that clause is this, that the company agrees to keep this mine supplied in a reasonable manner with the necessary timber, to put in the necessary timber with reasonable promptness, not with absolute promptness to the very moment, but simply with reasonable promptness; with respect to water, they agree to keep that mine reasonably clear from water, not to keep it perfectly dry, but to keep it reasonably clear from water, so that there will be no unreasonable interference with those men in the performance of their contract. The same applies to the stipu-

lation in regard to the track: they have to keep, I should say, the track in reasonably fair condition.

Now, what are the facts? I am bound to say that I find it impossible from the evidence to find that the track was not kept in a reasonably fair condition. At any rate, it was kept in such condition that some of these men were able to earn $5 or $6 a day at times, and some of them said they earned on an average $4.50 a day. With respect to water, taking the evidence of Landles, the pit boss, and balancing it with the evidence of the plaintiffs, I confess that I am unable to come to the conclusion that the plaintiffs have proven, as the burden was upon them to prove, that the water was not removed with reasonable promptness. There may have been some wet there; no doubt there was, but I do not think that the plaintiffs, or the individual plaintiff of whom I am hypothetically speaking, has satisfied the burden that is on him of proving that there was any unreasonable condition. The same applies to the timber. There was delay, no doubt, but I confess I do not think they are entitled to come in and demand as their right that that mine should work as a piece of perfect machinery and that there should be no delay whatever in putting up the timber. As I have already said, if they wanted to put such a stringent burden on the defendant company, they should have put it upon them by express words. They did not do that, and I find the fact that timber was attended to with reasonable promptness. It is true some of the plaintiffs say that they did attend to the timber themselves, but I am not convinced that they would have been doing anything else in the meantime.

I wish to make this observation, however, that something was said during the course of the trial about the amount these men were earning. These men were on contract, and they had a perfect right to earn just as many dollars a day as they could. They had a perfect right to make $10 a day, if they could, out of their contract, if they wanted to, and there should be nothing inferred against them because they made a great deal. They have just as much right to make a good thing out of their contract as a railway contractor has to make out of a contract building a railway. But the fact still remains that they did make what was apparently a pretty fair wage; and the fact remains that the condition of the mine, as I find it to have been, was not

an unreasonable one, and that the delay in supplying timber was not an unreasonable delay. That is all, I think, that the plaintiffs could ask. Perhaps I am repeating it too much, but I insist upon it that they have no right to ask that the whole affair should work so perfectly, at any rate, under the agreement as it now stands. So that, even on the merits, if any individual action had been brought, I am of opinion that the plaintiff would not succeed in establishing what he should establish in order to recover damages.

Just let me refer for a moment—it is scarcely necessary in view of so much being said—to what is popularly called the Lemieux Act. In my view, that Act, which is technically called the Industrial Disputes and Investigation Act of 1907, has absolutely not a single thing to do with this case. That Act was passed for the purpose of preventing industrial disputes and for preventing strikes and lock-outs, and all it did was to provide for the establishment of a board of conciliation and to insist that before a party to a dispute should take any action which would interrupt trade, which would lead to the interruption of commerce, either by a strike or by a lock-out, he must refer his case to a conciliation board, and, if he does not do so, it provides that he may be fined. It simply forces the parties to such a dispute to go before a conciliation board and see if the matter cannot be arranged. It had no intention beyond that at all. There is not a single thing in the Act which would give this agreement which is alleged here any higher efficacy or authority than it would have had, had it been entered into quite apart from a meeting of any conciliation board. Mr. Mackie referred to sec. 62, but I can find nothing in that section which would make this agreement any more binding than it would have been otherwise. In fact, I rather think that the Act is just a little misleading when it speaks of parties, as it does in sec. 62, being bound as upon an award made pursuant to a reference to arbitration, because in nearly every case, that is, cases in which I have had experience, the parties to such a dispute are, in the first place, the employer who is generally a definite person or a corporation, and, on the other hand, the employees, an indefinite body, represented by some trades union, not incorporated, not registered. So that the use of that expression, parties being bound upon an award, is to my mind—I think I understand the Act—a little misleading, because it is very difficult, just as we find here, to see how such parties as the trade union

can be bound civilly when they cannot sue or cannot be sued. Possibly by means of the principle of agency, if the parties are definitely known and described, that is, the individual employees are named and the document is signed by persons who are recognized as their agents, they might be bound. In fact, in the judgment I have just given, I have practically admitted that, when I ruled against Mr. Lavell's objection that there was no agency in this case for signing the agreement of 23rd December; but, at any rate, however that may be, it is quite clear to my mind that there is nothing in the Act which places such an agreement as this in any higher position than it would be had it been entered into quite irrespective of the Act altogether.

For these reasons, I think the action will have to be dismissed entirely, with costs.

ALBERTA.

BECK, J. JUNE 27TH, 1908.

CHAMBERS.

ALEXANDER v. THOMPSON.

Attachment of Debts—Garnishee Summons before Judgment —Nature of Claim in Principal Action—"Debt or Liquidated Demand" — Action for Partnership Account — Amount Involved — Promptness in Proceeding with Action where Garnishee Summons Issued.

Application by the defendant to set aside a garnishee summons.

H. H. Parlee, for defendant.

S. E. Bolton, for plaintiff.

BECK, J.:—No grounds are stated in the Chambers summons. The grounds taken on the argument were that the demand as stated in the statement of claim is not a debt or liquidated demand (Rule 384, Jud. Ord. C. O. 1898 ch. 21, "Attachment of Debts"), and that the amount owing by the defendant to the plaintiff does not exceed $60, and presum-

ably it is asked that I should confine the effect of the garnishee summons to this amount.

The statement of claim alleges: (1) that the plaintiff and the defendant entered into partnership to cut ties, &c., each to be entitled to one-half of the profits; (2) that the profits amounted to $905.52; (3) that the defendant took the contract in his own name, and refuses to account for any portion of the profits; (4) the plaintiff claims one-half of the said profits, namely, $452.76.

In Lindley on Partnership, 7th ed., p. 591, it is said: "The Judicature Act and Rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account: for, although the right to an account was a legal right, the old action of account, at least as between partners, had long been obsolete, and courts of law had no machinery enabling them to do justice in matters of account. Hence it became settled that actions involving accounts between partners could not be sustained. The Judicature Act and Rules have, however, abolished this rule." And Lord Redesdale in Attorney-General v. Dublin, 1 Bli. N. S. 312, at p. 336, says: "It is every day's practice, although the common law has provided this remedy, for courts of equity to take upon themselves the investigation of accounts. . . . The writ of account at common law did not exclude, but rather was superseded by, the jurisdiction of the courts of equity on this subject: because the proceeding in equity was found to be the more convenient mode of calling parties to account, partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of courts of equity." And see Allen v. Fairfax Cheese Co., 21 O. R. 598. Following the passage already quoted from Lindley, it is said: "An action may be maintained by one partner against another for any money demand which before the Judicature Act could have been made the subject of a suit for an account. And at p. 499 it is said: "The fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against the other should fail."

Under our present practice an action for an account of course lies (Rule 234, English O. XV., r. 1); and the plaintiff

in the present action might have asked for an account and payment of the amount ultimately found due to him (Eng. Jud. Orders App. C., sec. ii., No. 4). The taking of account is merely the method of ascertaining the precise amount which the plaintiff claims to be due to him. If he has otherwise ascertained or estimated the amount, I see no reason why he should ask for a remedy which he is of opinion he does not require, and therefore does not ask or desire. It is, indeed, true that if the correctness of his claim is disputed it may become necessary to take an account, and, if so, it should be taken or directed. If an amount is ultimately found owing to the plaintiff, it is a debt which all along existed, but the precise amount of which was perhaps unascertained. Probably under the older practice of the common law courts an action of debt could not be sustained where the amount could not at least be ascertained readily by calculation; but that was owing to the want of the necessary machinery.

For this and other reasons, I think that in interpreting the words "debt or liquidated demand," one should not consider himself restricted to the cases which fell within the definition of debt under the common law system of jurisprudence. Whether or not an ordinary tradesman's account, where no specific prices were agreed upon, fell within that definition, it is clear that it is a "debt or liquidated demand" under the Judicature Rules (English Rules, App. C., sec. iv., No. 1). So also a claim for work done on a quantum meruit (Stephenson v. Weir, 4 L. R. W. 369); and on a building contract (Meade v. Mouillott, 4 L. R. W. 207); and on an untaxed solicitor's bill (Smith v. Edwardes, 22 Q. B. D. 10).

I think therefore the plaintiff's claim is one for a "debt or liquidated demand," and consequently that the garnishee summons is valid as against the first ground taken.

Furthermore, it seems to me that, had the claim been for an account and payment of the amount found due, the plaintiff's action would still have been for a debt or liquidated demand in respect of which he would have been entitled to issue a garnishee summons on pledging his oath to a minimum sum as owing to him.

As to the second ground, namely, that the defendant is not indebted to the plaintiff in the amount claimed, I cannot deal with that question on this application. To do so would be virtually trying the action. I think, however, that in all

cases where a plaintiff has taken advantage of an extraordinary interlocutory remedy such as caveat, injunction, or garnishee summons, he is bound to prosecute his action with special promptitude. He, no doubt, may also be put upon terms to do so with greater promptitude than the ordinary practice of the Court imposes upon him, at all events, in the case of caveats and injunctions. If he fails in this respect, he may be deprived of the benefit of his extraordinary interlocutory remedy. It seems to me that the same principle should be applied in the case of a garnishee summons (see Rule 386 (2)). An application in this view may perhaps be made at a later stage: see Daniel Chy. Prac., p. 1670 et seq.; Finnegan v. Keenan, 7 P. R. 385.

The present application is dismissed with costs to the plaintiff in any event.

ALBERTA.

STUART, J. JUNE 29TH, 1908.

TRIAL.

SWAN v. CANADIAN NORTHERN R. W. CO.

Railway—Injury to Passenger at Station—Unsafe Condition of Platform—Negligence — Contributory Negligence — Evidence—Damages — Husband and Wife — Injury to Wife—Claim of Husband for Loss of Services of Wife—Joinder of Plaintiffs and Causes of Action—Quantum of Damages.

Action by Aline Swan and her husband to recover damages for injuries sustained by her owing to the negligence of defendants, as alleged.

C. F. Newell and H. S. Leish, for plaintiffs.

O. M. Biggar, for defendants.

STUART, J.:—In this action the plaintiff Aline Swan and her husband, the plaintiff Charles Swan, sue the defendant company for damages resulting from injuries received by the plaintiff Aline Swan, which it is alleged were caused by the

defendants' negligence. The wife asks for damages for the injuries caused to her personally, and includes in her claim the moneys paid for hospital charges and medical attendance, while the husband asks for damages for loss of his wife's services.

The defendants plead, among other defences, that the two plaintiffs are improperly joined as parties, because their causes of action are separate and distinct and cannot be joined in one action. After the evidence was taken, counsel for the defendants urged this latter ground of defence, and referred to Smurthwaite v. Hannay, [1894] A. C. 494, and other cases. It is quite apparent, however, that the matter depends upon considerations quite different altogether from those dealt with in the cases cited. We have no statute in force in this province which gives a married woman the right to sue alone as if she were a femme sole in respect of a tort committed against her. There is no Territorial Ordinance which touches the subject at all. Chapter 47 of the Revised Ordinances, 1898, refers only to rights and liabilities "in respect of personal property." Sections 36 to 41 of the North-West Territories Act, which are, no doubt, still in force in Alberta, notwithstanding the attempted repeal of that Act by the Dominion Parliament at the time of the consolidation of the Dominion statutes, do not in any way refer to the case of actions by married women in respect to torts committed against them. Our law on the point, therefore, still stands where the English law stood on 15th July, 1870, at which date no statute of any kind had yet been passed dealing with the right of a married woman to sue in her own name.

In the case of Weldon v. Winslow, 13 Q. B. D. 786, Brett, M.R., explained the old law as follows: "She is suing for personal injury to herself. For such a cause of action no action could ever have been brought by the husband alone without joining his wife as a plaintiff. What is done to her is the cause of action, and under the old practice she might have sued in her own name, without joining her husband, and could have recovered if the defendant did not plead her coverture in abatement, for he could not plead it in bar of the action. The injury to the wife was the meritorious cause of action, and, if she had died before the commencement of the action, the husband would not have been entitled to sue. If damages should be given, they would belong in the first place

to the wife alone, and if they should not be reduced into possession by the husband, and he should die, the damages would be hers, and would not go to his executors. It seems to me that according to the law of England the action was always the action of the wife, subject to the right on the part of the defendant of insisting on having the husband joined."

Instead, therefore, of the husband here being improperly joined, the position is exactly the reverse. If the husband had not been joined, the defendant could have pleaded in abatement, or rather, could, under our present practice, have asked by summons in Chambers before the trial or summarily at the trial, and could have insisted, that the husband should be added as a party.

This, however, does not conclude the matter. The husband here claims special damages because he lost the services of his wife. It is clear that his loss of those services gives a ground of action to him alone, and that the wife herself has no cause of action arising from such loss. Two things must be clearly distinguished: (1) the wife has a cause of action for the injury to her person for which she may claim general damages, and in such an action the husband must be joined if the defendant demands it. This cause of action is in the husband and wife jointly. (2) The husband alone has a cause of action per quod servitium amisit. With this cause of action the wife has nothing to do, and, if such an action were alone brought, the wife would be an improper party. In Dengate and Wife v. Gardiner, 4 M. & W. 5, the question was briefly referred to. This was an action for slander (where the words were actionable themselves) spoken of the female plaintiff. The declaration stated as special damage that by reason of the words spoken certain persons refused to employ the wife as a servant. At the trial evidence of this special damage was tendered, but Abinger, C.B., rejected it because the action was the joint action of the husband and wife, and a verdict for general damages alone was given. On motion for a new trial, Abinger, C.B., said: "I am not surprised that no case can be found to shew that special damages can be recovered in an action by husband and wife for slander of the wife. She must join because she is the party slandered, and the husband must join for conformity; but, as the profit of her wages is entirely his, he alone can sue for the loss of them; just as in trespass by husband and wife for assault

on the wife, the surgeon's bill cannot be recovered. The right of action would not survive to her."

It appears, therefore, to be clear that, were it not for the legislation to which I shall presently refer, although the husband in this case would strictly be a necessary party "for conformity," as it is said, yet the claim for special damage by the husband could not be allowed. However, subsequently to the case cited, the Common Law Procedure Act, 1852, altered the law. Section 40 of that Act said: "In any action by a man and his wife for an injury done to the wife in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the Court or a Judge shall think fit." The scope of this section was considered in the case of Hemstead and Wife v. Phœnix Gas Co., 34 L. J. Ex. 108. There the wife had been personally injured by means of a gas explosion, and the husband's house and trade had also been injured. Two actions were commenced, one by the husband for the injury to the house, the second by the husband and wife jointly, in which damages were claimed by the wife for the personal injuries and by the husband because of loss of service. An order was made under the section quoted consolidating the actions, and appeal was taken from this order. The appellant contended that the section was not intended to cover such a cause of action as arose from the injury to the house, but argued that it was confined to damages suffered by the husband by reason of the injury to the wife. The Court held, however, that the order was properly made, and that the section covered the wider ground. It follows from this case, as was indeed there admitted by the appellant, that the individual action of the husband for loss of services can certainly be joined with the action of husband and wife jointly for general damages for the injury suffered by the latter. These cases, I think, dispose of the defendants' contention and render it unnecessary to decide whether or not Order 18, Rule 4, of the English Rules, which says that "claims by or against husband and wife may be joined with claims by or against either of them separately," and which is not repeated in our Rules, is in force in this province. The rule was, no doubt, substituted on the passing of the Judicature Acts for the section of the Common Law Procedure Act which I have referred to. It might, perhaps, be contended that our Rules

as to parties are exhaustive, and that even the Common Law Procedure Act cannot be held to be in force with us, but it seems to me that, as the relation of husband and wife furnishes a special case not dealt with by our Rules at all, and as we have to go back to the law as it stood before 15th July, 1870, to ascertain the position of the wife in any case, at least with respect to her right to sue in tort, we must take the law upon the subject as it then stood as a whole, and this will include the section of the Common Law Procedure Act to which I have referred. Even if it were otherwise, and we were driven back of that statute, the precedent of Dengate v. Gardiner would shew that I should merely have to disregard the special claim of the husband for loss of services. But, for the reasons given, I think it must be also considered and dealt with.

The facts of the case as I find them are as follows. The two plaintiffs with their daughter had prior to 28th October, 1907, been living in the neighbourhood of Lloydminster, while a son was residing in that town, not far from the Canadian Northern Railway station. The plaintiffs had decided to move with their daughter to Vancouver to take up their residence there, and on the date mentioned had come into Lloydminster with the intention of leaving that evening on a train of the defendant company for Edmonton. They stopped at the son's house, and about 9 o'clock in the evening the plaintiff Charles Swan had gone to the ticket office at the defendants' station and had bought 3 first-class tickets to Edmonton. He had previously arranged for the shipment of his household goods, and, after purchasing the tickets, had checked the baggage belonging to the party except such as they would require to take with them on the train. He had then returned to his son's house to await the arrival of the west-bound train, which was due about 11 o'clock. Shortly before that hour the two plaintiffs and the daughter and the son went to the station, the 3 former to board the train and the son to assist them. The father and son went ahead, carrying some hand baggage, and the mother and daughter walked behind. They reached the platform of the station, which lay on the south side of the railway track at the west end, and then found that the train had already reached the station. There was a considerable number of people at the station, some intending travellers and some no doubt curious specta-

tors. The party walked eastward along the station platform, the father and son still in front and the mother and daughter behind. The train consisted of engine and tender, a mail and express car, a baggage car, next a colonist, that is, a second-class car, then another colonist car, than a first-class car or day coach, and lastly a Pullman car or sleeper. The train had been so placed that only the first colonist or second-class car stood opposite the platform. The rear steps of this car were, as the evidence clearly shewed, just opposite the eastern end of the station platform. At the eastern end of this platform there were two steps leading down to the ground, so that a person descending regularly would reach the ground with the third downward step. Beyond these steps to the eastward there was nothing but the ground beside the rails, except that a sidewalk some 6 feet south of the rails ran eastward to a street. The steps therefore leading to the first-class car were several feet from the ground, and there was no convenient means of entering that car except by first entering the first colonist car from the station platform and walking back through the train to the first-class car. The night was very dark, and the only lights at the station were an oil lamp at the side of the station building, some 87 feet west of the eastern end of the platform, and possibly another further west at the western end of the station building. The plaintiffs, for some reason which they did not clearly explain, instead of entering the train by the forward steps of the first colonist car, went on eastward through the crowd of people to the steps at the rear end of the car. The conductor of the train had, when the train stopped, come forward through the colonist cars instructing the people who desired to alight to come with him to the front of the first colonist car, and he then descended to the platform with a lantern in his hand and assisted the passengers to alight. The reasonable explanation of the action of the plaintiffs in going further eastward is that they saw these people alighting, and, as travellers often do, thought they could get into the train sooner by going to another entrance, instead of waiting for all the passengers leaving by the front steps to alight. At all events, the plaintiffs when they reached the rear steps found passengers leaving the train by that exit and found others also there entering the car. The father and son apparently succeeded in getting somewhat nearer the steps, in-

tending to go in with hand baggage first. The plaintiff Aline Swan and her daughter stood somewhat further back from the steps of the car. It did not clearly appear whether or not the plaintiff Aline Swan was aware that she was standing in the neighbourhood of the eastern steps of the platform. She had been at the station two years before, but had not been there in the meantime, and she clearly had no accurate knowledge of the size of the platform or of the location of the steps. Whether or not she knew that these steps were somewhere near her or not, she clearly was not aware how close to them she was standing. A man in the crowd asked her to let him pass, as his little girl was ahead. She stepped aside to comply with his request, and in doing so stepped beyond the edge and fell to the ground and was injured.

It is to recover damages for this injury that this action is brought, and the question is, are the defendants liable?

The plaintiff had been sold a ticket, and she was entitled to travel by the train. The platform constituted a portion of the premises of the defendants on which the plaintiff had been invited to stand as a means of reaching the train. It was, therefore, clearly the duty of the company to see that the platform was in a reasonably safe condition for the plaintiff to use, and that such condition of reasonable safety should exist at all points or parts of the platform where the plaintiff was entitled, owing to the invitation extended to her, to be. The case should clearly turn upon the simple question whether or not the plaintiff was entitled to stand where she was standing immediately before the accident. I cannot see that any advantage can accrue to the company by reason of any announcement or instruction that may have been given by the conductor within the train to passengers intending to alight. There is no evidence whatever of any guidance or instruction having been given to passengers waiting on the platform and intending to enter the train. It is clear that a number of intending passengers did pass by the front steps and go on eastward to the rear steps. Nothing was done to warn them against this or to prevent them. These intending passengers, the plaintiffs among them, found passengers alighting by means of the rear steps. The door was open, and the steps clear evidently for that purpose. The plaintiffs found passengers entering and alighting without question. In my opinion, the question is not whether this

rear door was originally opened by an official of the company or by a stranger, as to which there is no evidence at all one way or the other, but whether, when the plaintiffs in fact saw it open, and in fact saw people entering and leaving thereby without any interference or warning by any officer of the company, they were not justified in assuming that what was going on was with the approval of the company, and that they were invited to enter the train by those steps and by that door. I think they were justified in making that assumption in the circumstances, and that the fact that the company permitted that door to be open and those steps to be used in the way the plaintiffs found them open and being used, constituted an invitation to the plaintiffs to enter the car by that way. This being so, the plaintiff Aline Swan was clearly entitled to stand on the platform in the immediate neighbourhood of those steps to await an opportunity to enter. It was, therefore, the duty of the company to see to it that the platform in the neighbourhood of the place where the plaintiff was so entitled to stand, where she had in effect been invited to stand, should be in a reasonably safe condition, and not in a dangerous condition. The fact is that it was in a dangerous condition, quite aside from all questions of the darkness of the night and the amount of light.

There can be no question, in my opinion, as to the contributory negligence of the plaintiff. Even had it been broad daylight, I think she would have been entitled to assume that while she was standing in a crowd around the car steps waiting to enter upon the invitation extended to her, she would not by an accidental step sideways be precipitated over the edge of the platform. The facts of the darkness of the night and the meagreness of the light simply make her case stronger against the defendants, and, in my view, relieve her of the remotest possibility of being charged herself with carelessness. Whatever light there was must have been very meagre, and, in my opinion, she could not reasonably be expected to examine carefully by peering through the dim uncertain light into the exact condition of the platform around her feet. She was entitled to assume that it was safe and to act on that assumption. I think that no carelessness whatever can be attributed to her, and therefore that the defendants are clearly liable, and I so hold. See Foulkes v. Metropolitan Co., 49 L. J. C. P. 361.

As to the amount of damages, the evidence is that the plaintiff injured suffered a fracture of the thigh bone; that she was in the hospital for some 6 weeks; and that, after leaving the hospital, she was unable to move by herself until April. The attending physician stated that the recovery was satisfactory, considering the injury, but that her leg is now an inch short; that her foot is turned outward; and that she will always be lame, though able to get around with a stick. She is 64 years of age, and was prior to the accident in ordinary good health for a person of her age. It is very difficult to decide what pecuniary compensation should be allowed to her. A person of her age could not expect, in any case, to be particularly active physically for any great length of time; while, on the other hand, a fracture of the thigh bone and the consequent shock would certainly be likely to have a more permanent effect upon her physical strength and activity than in the case of a young person with greater recuperative powers. The evidence, however, does not disclose any general effect of this nature. As far as the evidence goes, the result has simply been a condition of permanent lameness. She must, of course, have suffered considerable pain, and, if I can safely judge from her actions and appearance at the trial without a suspicion of make-believe, as to which there is no suggestion, she is still in a weak condition, and in need of assistance as she goes about. In our experience in the Courts we have often seen it happen that for the complete loss of a leg a man in early life has been allowed by 6 reasonable men damages ranging perhaps from $3,000—which amount I observe was allowed only the other day in Calgary—to perhaps $6,500, which was recently allowed by a jury at Red Deer. For myself, I have always felt that for such a loss even the higher sum is little enough, but, considering the greater age of the present plaintiff and the lesser nature of the injury and its consequences, which, as I have said, simply amount to this, that she will be always lame and will need a stick to go about with, I cannot but feel that even the sum of $1,000 would be somewhat out of proportion; that is, that it would be just a little too much to allow. I therefore, on the best consideration I can give the matter, have decided to allow the injured plaintiff the sum of $800.

It is not quite clear from the statement of claim which of the plaintiffs is claiming compensation for the hospital and

medical expenses, but, as the evidence is that these were paid by the husband, whose legal duty it was, no doubt, to meet them, I think these should be given to him. They amount in all to $260.50, which does not appear to be unreasonable. The evidence also shewed that the wife, husband, and daughter were detained in a lodging house in Edmonton during the period of the wife's convalescence; that the daughter was obliged to wait upon her as a nurse; and that during this time their living expenses amounted to $60 a month. It is not clear how much, if any, of these expenses should be allowed. Whether they could have lived during that period more cheaply in Vancouver does not appear, nor was there any evidence to shew whether the husband lost any specific opportunity of employment in Vancouver, or whether, if he had gone there at once, he would have earned any definite amount, or whether, in fact, his presence in Edmonton with his wife was strictly necessary. It seems to me that his loss of employment in Vancouver was presented too vaguely in the evidence to justify me in attempting to base any damages upon it. On the other hand, there can be no doubt that the enforced residence of his wife and daughter in Edmonton for some months at a lodging house must clearly have entailed some pecuniary loss upon the husband. I cannot, of course, give the husband judgment for any damages resulting from the loss of his wife's services in the future, but he has certainly lost her services up to the date of trial. He has also, there can be no doubt, been gravely interrupted in his plans for the future, and I therefore think that, taking everything into consideration, it will be only fair to ask the defendants to pay the full costs of living for the 3 during the period of convalescence after leaving the hospital, and also something in addition for the husband's loss of the wife's services during that time. Upon the evidence I fix the damages for these two accounts at $250. Those added to the hospital account would make $510.50. There will therefore be judgment for the plaintiff Aline Swan for the sum of $800 and for the plaintiff Charles Swan for the sum of $510.50, with costs of the action.

ALBERTA.

STUART, J. JUNE 30TH, 1908.

TRIAL.

PATTERSON v. EDMONTON BULLETIN CO.

Libel—Privilege — Fair Comment—Newspaper—Publication of Statement Made by Third Person Reflecting on Plaintiff—Relation to Report of Civic Investigation—Repeating Statements Made at Investigation — Stating Facts which Might have been Related at Investigation—Damages—Mitigation—Costs—Scale of.

Action for libel.

J. R. Lavell, for plaintiff.

O. M. Biggar, for defendants.

STUART, J.:—The plaintiff is the chief of police of the city of Strathcona. Some time in February last one Harry Lynn addressed a letter to the municipal council of that city wherein he made certain charges against the plaintiff in his capacity as chief of police, to the effect that the plaintiff had been guilty of drunkenness on duty, and had taken money from a Chinaman who desired protection from prosecution for certain illegal practices. These charges, with others, were referred by the council to the police committee for investigation. Upon this investigation certain evidence was given with respect to the charges, including the charge in regard to the Chinaman. One Harris, a constable serving under the plaintiff, also gave evidence to the effect that the plaintiff had treated him (Harris) "sarcastically," as he said, when he, the plaintiff, had been intoxicated, and, as I find as a fact, that he (Harris) had seen the plaintiff drinking in hotels and staggering drunk when on duty. The police committee, after hearing this and other evidence, made a report to the council in which the charges were held not to have been proven, although certain criticisms were passed on the conduct of the plaintiff. The mayor of Strathcona, who was a member of the committee, dissented from this report, holding that it was not strong enough against the plaintiff.

Subsequently, though for what reason does not concern us here, this report was referred back to the committee for further consideration. The committee met again, and the plaintiff and Harris were called before it. Harris was proceeding to give certain evidence to the committee with respect to the charges made, when he was stopped by certain members of the committee, and his evidence was not allowed to be given, apparently on the ground that the evidence tendered was purely hearsay and not of his own knowledge. Harris, who was clearly not on good terms with the plaintiff, was apparently dissatisfied with the action of the committee, and thereupon sought an interview with one McRae, who was in the employ of the defendant company and a reporter for a newspaper published by them in the city of Edmonton. He made certain statements to McRae with regard to the action of the committee and with regard to the evidence which he could have given them if he had been permitted to do so. McRae thereupon wrote an article for his newspaper, quoting the statements of Harris, which article appeared in the issue of 21st April, 1908, and which is as follows:—

"Officer Harris Claims he was Unjustly Treated.

"The Police Committee of the Strathcona City Council Refused to Hear the Charges that he Wished to Make against Police Chief.

"The trouble in Strathcona police department is by no means at an end as the result of what the 'Plaindealer' designates as the latest 'kalsomining' administered by the police committee.

"Constable Harris, upon whom the committee shouldered the blame in their second report, is naturally very indignant at what he claims is grossly unjust treatment to him. Last year's police committee commended his work in strong terms, and he thinks it is very strange that he should receive such unfair treatment as he has now done. Before the last report was drawn up, he was summoned before the committee, but they refused to hear half his story when it incriminated the chief. No charges have been made against him by the chief, and when he asked the chief before the committee if he had any to prefer he said that he had none.

"Constable Harris emphatically denies that he endeavoured to secure for himself the position of chief of police.

In fact he has repeatedly refused to accept the position if it were offered to him.

"'The committee in their report say that I made no charges against the chief, but I did, and I said that he repeatedly snubbed me when he was intoxicated. I have seen him drinking in hotels and staggering home drunk with his uniform on. I was not desirous of acting the public prosecutor against the chief, but I told the committee of the council many facts on which they could work if they wished to do so.

"'I started to tell the committee of certain statements that had been made concerning the chief, to me, by a woman of ill-fame, but Ald. Bush refused to hear what I had to say. When I remonstrated with this woman for noises at night near her house, she told me that she was safe, as she was paying $15 a month to secure her from prosecution. This the committee refused to listen to.

"'When the meeting of the committee took place, I expected there was to be another session, but, as the case looked bad for the chief, it was apparently smothered up by the committee.'

"Officer Harris says the matter will not rest now, and he is determined to see that he gets justice and a square deal."

On 24th April the plaintiff began this action against the defendant company for libel, and in his statement of claim the libel complained of is stated to be contained in that portion of the above article commencing with the words "Constable Harris emphatically denies," and ending with the words "apparently smothered up by the committee." The libellous statements and innuendoes complained of are that it was in effect asserted in the article that the plaintiff was a drunkard, that he used intoxicating liquors while on duty, that he accepted bribes from women of ill-fame for which he guaranteed them immunity from prosecution for violation of the law, and that he was unfit for the responsible position which he held.

The statement of defence as originally filed consisted, firstly, of an account of the events to which I have referred as leading up to the publication of the article complained of, and also of certain events which occurred subsequently thereto in connection with the position of the plaintiff and the charges against him; secondly, of a denial of malice in the publication of the article; and thirdly, of a plea that the de-

fendant company never themselves made the assertions complained of, but only "obtained news" that Harris intended to make charges against the plaintiff of the nature referred to in the article in question; that said Harris did, in fact, afterwards make such charges, and that such charges were investigated by a Judge of this Court. The defendant company paid into Court the sum of $50 in full of any damages that the plaintiff may have suffered.

As the pleadings then stood before the opening of the trial, there was no denial of publication and no plea of justification, and the pleas then on the record did not, in my opinion, constitute good pleas at all. Only by a very remote inference from the wording of them could they be held to constitute possibly a plea of privilege or of fair comment or of both, or possibly with respect to part of the article a denial of the innuendoes alleged. At the opening of the trial counsel for the defendant company applied for and obtained leave to amend their defence so as to insert a plea to the effect that in so far as the article consisted of a report of the evidence given at the committee meetings the report was correct, and, as I assume was intended, for no formal amendment was drawn up, therefore privileged, and that in so far as it consisted of comment, though it was not stated upon whom or what, the comment was fair comment.

As there was no plea of justification, I am not concerned here in any way with the truth or falsehood of the statements or alleged innuendoes complained of. No evidence in chief was given by the plaintiff or by any witness on his behalf, but the plaintiff was called by his counsel in rebuttal, and was cross-examined without objection as to the truth of the statements complained of. This in any case was allowable only as to credit, and it would seem that in the circumstances even this should not have been permitted: see Odgers, p. 377, citing Bracegirdle v. Bailey, 1 F. & F. 536. In any case plaintiff's answers must be taken as true and final: Odgers, p. 376.

Now, in the first place, it is quite plain that the article did contain two statements which are clearly libellous. The statement "I have seen him drinking in hotels and staggering home drunk with his uniform on," must without question have been understood by every one who read it in the connection in which it was printed as referring to the plaintiff, and on the face of it, it is a libellous statement per se, because it referred to the plaintiff with respect to his occupation and

employment. The same thing exactly may be said of the statement "When I remonstrated with this woman for noises at night near her house, she told me that she was safe, as she was paying $15 a month to secure her from prosecution." This must be read with the preceding sentence, and, when so read, clearly means that a woman of ill-fame had told Harris that she was paying the plaintiff $15 a month for protection from prosecution. It is no defence to liability, though it is clear that it may mitigate the damages, that the libellous statement was not made directly by the defendant company, but was simply given as the statement of a third party, or that it appears on the face of it that even such third party was himself—in this case Harris—repeating the assertion of a fourth party. Every repetition is a new publication. There is therefore nothing whatever in the defence set up in the 9th paragraph of the statement of defence that the defendant company did not assert so and so. It is in law sufficient, unless there is a ground of privilege, as to which I shall speak presently, that they represent a third party as asserting or as repeating a fourth party's assertion.

With respect to the pleas of privilege and of fair comment, the two assertions stand in a somewhat different position. The first statement as to drunkenness had, as I find as a fact, been given in evidence by Harris at the first meeting of the committee. The second statement, the report of what the woman had told him, had never been given in evidence at all.

Now, the defendant company, in publishing the first statement, did not pretend in any way to be giving a report of the first investigation. That investigation had occurred some 6 or 7 weeks before. A very nice point might have arisen if on the next day after that investigation Harris had told another person, A, what evidence he (Harris) had given there, and if A had stated to B that Harris had given such evidence. There is no doubt in my mind that the investigation of such charges against an official in the plaintiff's position by such a public body as the police committee was a matter of public interest, not only in Strathcona but in the whole country, and that a correct report of the evidence there given would be privileged. Nor is there any doubt that the publishers of newspapers stand in no more favourable position as to privilege than any single individual. In the case I have supposed, therefore, A would not have been liable to the plaintiff

for his publication to B. But in this case the circumstances are different. Some 6 or 7 weeks had passed. It will hardly be contended that an enterprising newspaper was then purporting to publish a report of the proceedings of the committee which had taken place 6 or 7 weeks before. Moreover, the statement as to drunkenness with which I am dealing does not on its face purport to be, and I do not think, in the circumstances which I have mentioned, I should infer or that a reader would infer, that it was intended to be, a report either by Harris himself or by the defendant company of the evidence at that investigation. It was simply and plainly a reassertion as a fact by Harris that he had seen the plaintiff staggering home drunk with his uniform on. I can find no authority for the proposition, and I think no one would seriously suggest it, that the fact that a witness at such an investigation, where his words would no doubt be privileged, had sworn to certain facts, would justify him in walking out of the room and reasserting to every passer-by as fact, not as what he had sworn to, but as substantive fact, the statements he had there made. I think what Harris stated in the sentence quoted to McRae, and what the defendant company published, was in no sense a report of the evidence at the investigation, but an independent reassertion of the fact of drunkenness. This, I think, disposes of the question of privilege adversely to the defendant company.

What is the position with regard to the plea of fair comment? There is no doubt that the right to make fair comment on matters of public interest is enjoyed by individuals as well as newspaper publishers, and that if Harris, in saying what he did to McRae, was only commenting on the action of the committee, there would be no slander as far as he is concerned, and it seems to me that it would follow that the defendant company, in publishing his comment, would be in just as good a position as he. It was proven that Harris did tell the committee when giving his evidence that he had seen the plaintiff drinking in hotels and staggering drunk, though it is doubtful if he mentioned the uniform. Assuming, however, that he did mention the uniform, let us look at the matter thus. If Harris had said to McRae, "I told the committee that I had seen the chief drinking in hotels, &c., but they refused to believe me and made up a report exonerating the chief, contrary to what they should have done," that would, in my view, undoubtedly have constituted a fair com-

ment by Harris; it would have relieved him from liability, and therefore I think also the defendant company, because there would then have been no libel at all which it would take a privilege to cover. It is clear, however, that the distinction I have drawn when discussing the question whether the libel was privileged as a correct report of the evidence taken, must also apply here in dealing with the question of fair comment. If the sentence in question constituted an independent reassertion of the fact of drunkenness, it seems to me that the defence of fair comment must also fail. That defence arises where certain facts are assumed to be true, where there is no contest whatever as to the truth of the facts assumed. Indeed, fair comment must never consist of the assertion of fact at all. It consists of opinions and inferences from facts assumed to be true. It is plain from all the cases that the two are quite distinct and must be clearly separated. Besides, as there is here no plea of justification, and as the fair comment attempted to be shewn is really fair comment not upon the plaintiff as a public official or upon his acts, but upon the police committee and the acts of that committee, it is clear that the real fact, which after all must be taken to be the foundation of the alleged comment in this case, is not that Harris had seen the plaintiff drinking, &c., but the fact that Harris had sworn before the committee that he had so seen the plaintiff. It was the committee's rejection and disregard of this evidence that Harris complained of and was commenting upon in the statements which the defendant company published. In making this comment there was no need to repeat his assertions as facts. The distinction, I confess, is a rather fine one, but it seems to me to be a real one, and that the result is that the defendant company are liable with respect to the first libel complained of.

As to the second libel, the position is simpler. Harris had never given any evidence before the committee touching the question of bribery. In the interview in question he was simply stating the evidence he might and would have given if he had been permitted. There can, therefore, be no question of privilege on the ground of a correct report of a public proceeding. With respect to the question of fair comment, it is to be observed again that the comment is pleaded as being a comment, not upon the plaintiff, but upon the police committee for their action in rejecting the evidence which

Harris tendered; at least, that is what I understood to be the position of defendants' counsel in his argument?

I have succeeded, after considerable search, in finding two authorities which are in point on this question. The first is the case of Hibbins v. Lee, 11 L. T. N. S. 541. This case was a case in which the plaintiff had been charged before certain magistrates for an offence, and they had heard some evidence, had rejected other evidence which was tendered, and dismissed the charge. An anonymous writer then wrote a letter for publication in the defendants' newspaper making comments upon the action of the magistrate, and in the letter he stated certain other evidence that could have been given if the magistrates had been disposed to receive it. The defendants published this letter in their newspaper, although anonymously, and refused to give the name of the writer, so they were the only persons who could be sued. In that case Cockburn, C.J., in his charge to the jury, clearly lays down the principle that there was no justification for quoting this other evidence that might have been given. He says: "But the letter itself certainly goes further, and not merely comments on the facts proved at the first hearing, but on evidence which might have been adduced." He left it to the jury to say whether it was the intention of the writer of the letter not merely to comment on the action of the magistrates, but to assert that the plaintiff was really, in fact, guilty of the charge. That comes very near the present case, and it seems to me that, following it, the question for me to decide is simply whether Harris, when he made this statement to McRae which is complained of and which the defendant company published, intended merely to comment on the action of the committee or intended to assert that the plaintiff was guilty of receiving bribes. Reading the whole of the last paragraph of the article complained of, I have come to the conclusion that that was Harris's intention. You notice he said: "When the meeting of the committee took place, I expected there was to be another session, but, as the case looked bad for the chief, it was apparently smothered up by the committee." I am unable to take any other meaning from those words published than that Harris really did intend to insinuate by an innuendo that the plaintiff had been guilty of taking money from this woman for the purposes mentioned, and that being, as I find, the real intention of Harris, although he is not the person sued, yet the defendant com-

pany published his statements, and they are therefore liable just as much as the defendants were liable in the case of Hibbins v. Lee.

Another case which is a little in point is Helsham v. Blackwood, reported in 11 C. B. 111, in which the plaintiff had been tried for murder and acquitted. The killing had taken place in a duel, and a long time afterwards the defendant published an article dealing with this murder trial, and he spoke in the article of certain evidence that might have been given, but was not given, with regard to the plaintiff having practised up the night before with his pistols. The words were: "It was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz., that the prisoner (meaning the plaintiff) had spent nearly the whole of the night immediately preceding the duel in practising pistol firing." One of the Judges in giving judgment in the case, Talfourd, J., said—it was with respect to this damning piece of evidence which it was said might have been given—"If the argument of Mr. Peacock is to have any effect, it will follow that every man who has had the misfortune to be tried for a crime, will be for ever out of the pale of the law." I may say that it is peculiar that in the libel in this case the defendant used the very expression that Harris used in this present case, the case looked black for the prisoner, it "looked black enough to those who knew the law." Now, it seems to me that an exactly similar situation exists here. If it were possible, simply because there has been an investigation of a charge against a man in the plaintiff's position, which ended practically in his favour, for any person to make a statement, in commenting upon that investigation, that such and such evidence, and giving the evidence, might have been given if they had received it, why every man that had been tried for a criminal charge and acquitted, as Talfourd, J., said, would be out of the pale of the law. One could make any sort of statements he pleased in regard to evidence that might have been given and have it covered up by the principle for which Mr. Biggar contended, and as counsel in that case contended. I do not think that the plea of fair comment is wide enough to justify such a proceeding as that. All they have any right to do, it seems to me, is to say that they understand certain very damning evidence could have been given, but they have no right to state what that evidence was unless it had, in fact, been given. I am,

therefore, of opinion that the plea of fair comment does not cover the last of the two libels complained of, and that the defendant company are liable, technically at any rate, in respect to that libel also.

With respect to the amount of the damages, Odgers, at p. 369, says: "If the defendant in repeating the story as it reached him gives it as hearsay, and states the source of his information, then, but only then, is the fact that he did not originate the falsehood, but innocently repeated it, allowed to tell in his favour, as proving that he bore the plaintiff no malice." Thus, where it appears on the face of a libel that it is founded on a statement in a certain newspaper, the defendant is entitled to shew that he did in fact read such statement in that newspaper, and wrote the libel believing said statement to be true. So, if in the libel the defendant has named A as his informant, he may prove in mitigation that he did in fact receive such information from A, though of course this is no defence to the action." Here the evidence of McRae shews that he did, in fact, receive the information from Harris, and I am quite convinced that the article was published without the slightest malice towards the plaintiff at all, and that it was an oversight that it appeared in the paper. As Cockburn, C.J., said in Hibbins v. Lee: "We all know what we owe to the press, and we must all agree that it would be very hard if, while communicating to us day by day, or week by week, an immense mass of information, the publisher or printer were to be held responsible more than necessary for any casual attack upon private character which may happen to get into his paper." Something was said, however, as to the fact that these charges were well known to have been made and other similar charges at the investigation. Odgers says: "Evidence of previous publications by others is, as a rule, inadmissible even in mitigation of damages; that others besides the defendant have defamed the plaintiff is an irrelevant fact (Tucker v. Lawson, 2 Times L. R. 593); and so is the fact that on such former occasions the plaintiff did not sue the publisher or take any steps to contradict the charges made against him. And, even when the falsehood thus unchallenged grows to a persistent rumour or general report, which the defendant hears, believes, and repeats, this is not regarded in law as a mitigating circumstance." That may be so, but it seems to me in this particular case some allowance should be made for the fact that it was well known through

the community that such charges were being made, and I do not propose to fix any very large amount for damages. I think I will make it a little larger than the amount paid into Court. The damages will be fixed at $75. This relieves me from the necessity of considering the effect of the payment into Court and the Rule which Mr. Lavell quoted in regard to payment into Court in cases of libel and slander. Costs will be on the lower scale except with respect to disbursements already paid, which will be taxed as they were paid; and, if necessary for me to say so, there will be no set-off on account of the action being brought in the larger scale.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 22ND, 1908.

TRIAL.

HUTCHINSON v. SCHLEUTER.

Vendor and Purchaser—Contract for Sale of Land—Want of Title in Vendor—Failure to Procure Title—Evidence—Damages for Breach of Contract — Loss of Increased Value of Land—Improvements.

Action for specific performance of a contract or for damages and also to recover money lent. Counterclaim for the price of goods sold.

A. Casey, Regina, for plaintiff.

Creear, Humbolt, for defendant.

PRENDERGAST, J.:—The plaintiff alleges that by memorandum in writing the defendant agreed to sell to him for $10 an acre a certain quarter-section, of which the defendant represented himself to be the owner, and at the same time verbally undertook to have a proper contract prepared for execution; that he (plaintiff) paid defendant $480 on account at the time of the signing of the memorandum, as the same called for, and thereafter, with the defendant's leave and knowledge, made improvements on the land; that he has repeatedly asked the defendant for a proper agreement of sale in writing, which the defendant has always refused; and he claims specific performance or damages.

The defence is, in effect, that the defendant did not represent himself as owner of the said land, but simply agreed with the plaintiff that, acting as his agent, he would attempt to procure the same for him at the price stated, which he was unable to do, as the said quarter-section was vested in the Crown.

The plaintiff's version is that in the forepart of 1906 his son William had preceded him to this province, and, with the defendant's aid, had selected in the vicinity of Mandal post office 3 homesteads—one for himself, one for the plaintiff, and one for another of the plaintiff's sons. In the latter part of April of the same year, the plaintiff, being on his way to his newly acquired homestead, stopped at Davidson and was there introduced to the defendant by Alfred Gough, the owner of a restaurant where both parties were stopping. The defendant had apparently already inquired from William Schleuter whether his father was likely to buy any land, and he made the same inquiry from plaintiff himself on this occasion—to which the latter replied, "Yes, if the quarter is close to my homestead," and in turn asked the defendant if he had any land himself. The plaintiff says the defendant's reply was, "I have got the very quarter that will suit you," and that he added that he had sold the Grand Trunk Pacific a half-section, and had still a quarter left. If these were the words used by the defendant, the plaintiff would naturally understand, as he says he did, that the quarter-section which would "suit" him as adjoining his homestead, and the quarter-section which the defendant "had left," were the one and same quarter-section owned by him.

The defendant says, on the other hand, that he did not lead the plaintiff to believe that he owned the quarter-section here in question, and that the statement that he had a quarter left had no reference to this one. He says he simply told the plaintiff that he thought the quarter adjoining his (the plaintiff's) homestead was yet available, and that later on, when shewing him the two adjoining pieces, he replied to the plaintiff's inquiry as to the price of the latter, "that is supposed to be sold by the Saskatchewan Land Company at $10." Having, however, admitted making the statement that he had formerly three quarters, but had sold two to the Grand Trunk Pacific and had one left, and being asked which quarter he had left, the defendant gives the unexpected answer, "The one I was living on," and he adds:

"I did not tell him that quarter-section was the one I was living on, because he did not ask me." Alfred Gough, however, says that before the plaintiff arrived at Davidson, the defendant asked him if he (the plaintiff) had money and said: "If you introduce me when he comes, I can supply him." He is also positive in swearing as follows, with respect to the conversation between the plaintiff and defendant already referred to: "He (the defendant) said he had the quarter next door to Mr. Hutchinson's homestead, adjoining . . . he said he had the land adjoining the homestead . . . he said he had the land."

The plaintiff says that having viewed the land as stated, the defendant gave him the price as $10 per acre, $3 down and the balance in 7 annual payments without interest. The defendant swears that he simply said that it was supposed to be sold by the Saskatchewan Land Company at $10, without mentioning cash payment or any other terms, and that it was the plaintiff of his own motion who said that he would give $3 an acre to start. The defendant nevertheless admits that he then spoke to the plaintiffs about money, but gives this explanation, "I spoke about shewing his money, to shew he was in earnest." To emphasize his contention that the plaintiff understood that he would only be acting as his agent, the defendant says that this conversation occurred when he was about to leave for Davidson, where the Saskatchewan Land Company had an office, and that the plaintiff, being desirous of taking advantage of the opportunity, then said. "You might look up this matter of land for me."

The following document was then drawn and signed by the defendant: "Mandal, Saskatchewan, April 28, 1906. Received of James Hutchinson the sum of $480 for the southeast quarter of section 3, township 32, range 25, 2W, as a payment at the rate of $3 per acre." The plaintiff paid the defendant $480, and the latter left for Davidson. The plaintiff says he understood that the only reason for the defendant going to Davidson was that, not being a lawyer, he would have to have the papers prepared there.

The plaintiff says that the defendant, after returning from Davidson, gave him to understand that the papers would be forthcoming shortly. He at all events inquired from time to time (he says 7 or 8 times) if the papers had come, and states that the defendant on every occasion expressed his surprise that they had not yet reached him.

In the meantime the plaintiff was going on with improvements on the said quarter-section. He says he first asked the defendant if it were safe for him to do so, and that the latter replied, "Go on." This is, however, denied by the defendant, who says he told him that he would advise him not to build until he had the contract, although, as far as he could see, nobody had the land yet. The plaintiff, during that spring and summer, erected on the quarter-section a house and stable which he values at $400 and $100 respectively, bored two wells, and broke three acres of land. Now, the defendant hedged a good deal at the trial with respect to his knowledge of these improvements going on, and finally said he knew of them but did not see them, as he could not see them from his place. But from the evidence, including that of his own brother, it is clear that the defendant could see and did see from his own homestead that improvements were being performed on the quarter in question, that he passed by there several times, and even entered the house which the plaintiff had put up.

Finally, in September, being unable to get satisfaction from the defendant, and having heard that Helgeson Bros., real estate agents of Regina, had the sale of the said quarter, the plaintiff wrote to them and got their reply that such was not the case, and some time after the defendant announced to him that the land could not be had. The plaintiff says he told him then, "But I thought you had the land,"—and that the defendant replied: "No, I have not got it; it has gone back to the Crown." The defendant then offered to give the $480 back to the plaintiff, but the latter refused to accept the same in settlement, saying that he moreover wanted interest and damages for the loss of his improvements as well as for the increased value of the land itself.

The defendant's explanation of the whole matter is that he was simply doing a neighbourly act. He does not say expressly what his knowledge was as to the position in which that quarter-section stood. He says that after getting the $480 from the plaintiff, he proceeded to Davidson and there went to the office of the Saskatchewan Land Company, but found the same closed. He, however, happened to meet there Stayner Helgeson, of Helgeson Brothers, and inquired if they had that quarter for sale. Helgeson replied that he could not say just then, but would look up their lists at Regina and let him know. The defendant then asked him

to try and secure it, and he gave him $100 to bind the bargain. An exchange of letters followed between the two, extending over a period of some 10 months, the import of which was, on Helgeson's part, that they were making inquiries, until he stated definitely that the quarter-section was still vested in the Crown.

Now, Stayner Helgeson corroborates a good deal of the defendant's evidence as to the conversation they had together at Davidson. He says that he is sure that the defendant told him "that he wanted it for another party," and "that he said that the land would be $10 an acre." He also says: "I understood it that way, that he wanted the contract drawn in the name of another party;" but he does not remember the name. This seems at first sight to support the defendant's contention that he was not looking for a profit for himself. But, upon further consideration, this becomes less apparent and conclusive. The statement that "the land would be $10 an acre," was made in such a way that it may simply bear the interpretation that that was the price settled between the plaintiff and defendant. Helgeson also admits that the defendant asked him to get the land below $10, at $9 if he could. Then, the making of the contract in the name of the plaintiff would still leave it open to the defendant to say that, although it called for $9 only, he, having a prior option, had stated his price to the plaintiff as $10, and he could keep the difference as his profit out of the $480 he had received. Helgeson, who has large experience in such matters, was in the best position to gauge the import of the conversation, and he says, "I do not know if he was getting it for another without benefit to himself or not." Of course, this matter of profit is not a necessary element here, but it would raise a presumption by shewing an interested motive.

I am sure the defendant did not intend to place the plaintiff in the position in which he is to-day. It would be against his own interest to do so. The explanation of the matter seems to lie in the following facts. The Canadian Northern Railway Company had obtained from the government a considerable quantity of land in the adjoining districts. Some of those lands had been taken over by the Saskatchewan Valley Land Company. Helgeson Brothers had also been instrumental in disposing of a comparatively large quantity, and the defendant had assisted them in this as sub-agent, having done a considerable amount of work for

them. There is evidence to the effect that this quarter-section formed part of a large tract held by the Crown subject to selection by the railway company, but that some difficulty had arisen preventing the company from making the selection then. I am inclined to think that the defendant was under the impression that the selection had been made, and that the quarter-section was available, and he presumably thought for that reason that he was warranted in leaving the plaintiff under the impression that he did, believing that he could control the same through the Helgesons, as he had done for other land before.

The two buildings, although partly of sod and roofed with poles, which would make it hard to move them, cannot be a total loss to the plaintiff, especially as his homestead is adjoining, and I will allow him for these $375. For the well, at one dollar a foot, I allow $36, and for breaking, harrowing, and discing, $15.

With reference to the loss of the increased value on the land, it was laid down as a general proposition in Flureau v. Thornhill, 2 W. Bl. 1178, that a purchaser of land is not entitled to damages for the loss of his bargain on the ground alone that the vendor through want of title is unable to convey the estate. But this was modified in Engell v. Fitch, L. R. 3 Q. B. 314, it being decided there that the above rule is inapplicable where the non-performance arises, not through a difficulty as to title, but from the fact of the vendor not having first secured to himself the property which he assumes to sell. This has been followed by an abundance of decisions to the same effect both in the English and our own Courts. For the loss of the increased value of the land, I allow $2 an acre, or $320—making in all on the plaintiff's claim $746.

The plaintiff also claims $128 for money lent and services performed, and the defendant has a counterclaim for $563.10 for goods sold, etc. It was, however, stated in course of trial that the parties had settled these differences out of Court, the plaintiff admitting a balance in the defendant's favour of $430, which will be the amount allowed on the defendant's counterclaim.

There will be judgment for the plaintiff for $316 and costs.

SASKATCHEWAN.

WETMORE, C.J. JUNE 24TH, 1908.

TRIAL.

FOSTER v. WOODWORTH.

Promissory Notes — Indorsement by Debtor to Creditor — Question whether as Payment or Security—Evidence — Presentment—Waiver — Collateral Security—Lien Notes —Property not Passing.

Action to recover $228, the balance alleged to be due upon a sale of a stallion by the plaintiff to the defendant.

W. M. Kelloch, Weyburn, for the plaintiff.

Black, Weyburn, for the defendant.

WETMORE, C.J.:—The sale took place in April, 1906. The price agreed to be paid for the animal was $300, and it was to be paid in notes. The defendant transferred to the plaintiff a note made by one Lewis for $50, and gave his own note for $22. He also transferred to the plaintiff two notes made by A. F. Heglin, payable to the order of the defendant. one for $128 and the other for $100, payable respectively on 1st November, 1906 and 1907. These notes were dated 6th April, 1906. He also delivered to the plaintiff as security for the Heglin notes two lien notes, dated 7th February, 1906, one for $160, payable 1st November, 1906, and the other for $100, payable 1st November, 1907, made by one James W. Murphy in favour of Heglin or order. These last mentioned notes were given for two mules and a set of work harness. These Heglin and Murphy notes were never paid, and it is with respect to them that the questions in this suit arise. The defendant asserts that these notes were received absolutely by the plaintiff in part payment for the horse, and that they were not presented for payment when they became due, and notice of dishonour was not given. The Heglin notes were transferred to the plaintiff by indorsement. The Murphy notes were merely delivered to him; as a matter of fact they had never been indorsed by Heglin; and the plaintiff set up that these Heglin and Murphy notes were never intended to be transferred to him

at the time; that he merely agreed to take them if they were made satisfactory; and that they were left in the office of the Weyburn Security Company, where the Heglin notes were payable, until the security contained in the Murphy notes was made available, that is, until it was put in such a position that the lien could be made secure by being registered; that the security was never perfected as was contemplated; and that consequently the property in the notes never passed to him, and that it was understood that it was not to pass to him until the security had been made satisfactory.

The evidence, as usual, is very contradictory, but there is testimony which, in my opinion, throws the weight of evidence in favour of the plaintiff. The Lewis note, which formed part of the purchase price, was admitted to have been received in part payment for the stallion—that was admitted by both parties. That note was put in evidence, and it was indorsed by the defendant to the plaintiff "without recourse," and it was so expressly stated in the indorsement. The two Heglin notes were simply indorsed in the ordinary way. If the understanding was, as alleged, that the Heglin notes were received absolutely as part payment for the horse, and there was to be no recourse to the defendant, why were not these notes indorsed in the same way that the Lewis note was indorsed? If the case stopped there, however, probably the plaintiff's right to recover might be questionable, because it is asserted that there was no presentment for payment of these Heglin notes, and no notice of dishonour given. I am of opinion, however, that, in so far as the first Heglin note is concerned, which fell due on 4th November, 1906, the defendant waived presentment and notice of dishonour by promising to pay that note; in fact he at the same time promised to pay both of them, but that was before the note for $100 had fallen due, and I am doubtful whether the waiver could apply to that note. But, putting the question of waiver to one side, I am of opinion that the defendant conducted himself in a way that tends to bear out the contention of the plaintiff, especially in the statement he made to Mr. Dugald Davidson, the clerk of Mr. Keiloch, the attorney and counsel for the plaintiff, that "he would pay the notes all right, but asked that time might be given in order that he might see Heglin, who was at the time somewhere in the States." This testimony the

defendant does not deny. Moreover, the plaintiff did not know Heglin or Murphy; the Murphy notes as a security by way of lien were useless. It was very unlikely, therefore, that the plaintiff would accept these notes as absolute payment for his stallion. I am of opinion, therefore, that the plaintiff's version of the transaction is correct. That the notes were only left with him for the purpose he stated, and that he is entitled to recover for the purchase price of the horse.

A question has been raised in my mind whether the form of action is correct. That, however, is of a somewhat technical character, and, as the question was not raised, I do not feel called upon to express any opinion upon it.

I may add that I have not lost sight of the question which was urged, that these Murphy notes could not be made valid so as to hold the property mentioned therein under the Ordinance Respecting Hire Receipts and Conditional Sales of Goods. But, assuming that to be so, it would not affect the question. The security that the parties contemplated the plaintiff was to have not being forthcoming, the property in the notes did not pass to the plaintiff.

There will be judgment for the plaintiff therefore for $228 and costs.

SASKATCHEWAN.

WETMORE, C.J. JUNE 25TH, 1908.

SURROGATE COURT.

RE WOLF.

Executors and Administrators—Application to Foreign Executors for Ancillary Probate of Will—Proof of Letters Testamentary Granted in Foreign Court—Saskatchewan Evidence Act, 1907, sec. 15 — Certificate of Clerk of Court—Seal.

Application on behalf of George J. Wolf and Amelia Wolf for letters of probate to issue to them of the will of Andrew Wolf, deceased.

T. D. Brown, Regina, for the applicant.

WETMORE, C.J.:—The testator died in the county of Grant in South Dakota, and it seems that his will was proved in the County Court for the county of Grant, and letters testamentary were issued to the applicants herein. The only evidence of the will and of the probate and letters testamentary thereon in the county of Grant was a certified copy thereof by John W. Liggett, purporting to be clerk of the County Court, and he certifies that he is the duly elected, qualified, and acting clerk of the County Court of Grant, and that he has carefully compared such copy with the original will in the matter of the estate of Andrew Grant, deceased, now remaining on file and of record in his office, and that the same is a correct transcript therefrom and of the whole of such original, "as witness my hand and official seal this 4th day of June, 1908." The certificate to the alleged letters testamentary is of a similar character in so far as witnessing his hand and official seal is concerned. It will be observed that this purports to be a certified copy of the will and letters testamentary. Section 15 of the Evidence Act (ch. 12 of 1907) provides "that evidence of any proceeding or record whatsoever of, in or before . . . any court of record of the United States of America or of any State of the United States of America may be made in any action or proceeding by an exemplification or certified copy thereof purporting to be under the seal of such Court . . . without any proof of the authenticity of such seal."

I am of opinion that the certificate in this case is not sufficient, for two reasons. First, there is no evidence that the County Court of Grant is a Court of record. The certificate of Mr. Liggett does not state such to be the case, nor is there any other evidence of that fact. Second, the certificate sets forth that the seal is the official seal of the Court, and the legend on the seal is "Grant County, Clerk of County Court." This does not signify that it is the seal of the Court, and to receive the document in evidence would be directly at variance with what was laid down by the Court in Junkin v. Davis, 22 C. P. 369. I may just draw attention to the fact that this case was considered in Beebe v. Tanner, 6 Terr. L. R. at p. 13. In that case the legend on the seal was "Clerk of the Surrogate Court, Sixth Judicial District, South Dakota, Walla County," but the clerk certified in effect that that seal was the seal of the Court, and that was held sufficient. The certificate in this case does not bring

it within what was decided in Beebe v. Tanner. The certificate, therefore, does not comply with the requirements of the section of the Evidence Act referred to, and I must refuse the letters.

SASKATCHEWAN.

PRENDERGAST, J. JUNE 26TH, 1908.

TRIAL.

ELLEMAN v. CARRUTHERS.

Vendor and Purchaser—Contract for Sale of Land—Misrepresentations by Vendor as to Building on Land—Statute of Frauds—Oral Evidence — Damages—Rectification of Contract—Description—Specific Performance—Costs.

Action for rectification of a contract for the sale of land, for specific performance of the contract as rectified, damages, and other relief.

J. Balfour, for plaintiff.

N. Mackenzie, K.C., for defendant.

PRENDERGAST, J.:—On 17th or 18th July, 1906, the defendant, being the owner of a lot with a shack at the rear, verbally agreed with the plaintiff to erect a dwelling on the front part thereof and convey the whole to her, when completed, for $1,200, payable as follows: $100 forthwith, $700 to be raised by mortgage on the premises, and the balance of $400 and interest in instalments spread over a period of 9 months.

The building was begun on 18th July.

In the latter part of August the plaintiff went into possession.

On 4th October the parties executed an agreement of sale in the usual form, whereby the defendant agrees to sell to the plaintiff "all of lot 41 in block 314 in the city of Regina" (which I will assume for the present to be a correct description of the lot in question), and the price is therein given as already set forth. It makes no mention of buildings, and contains no conditions other than the payment of the purchase price. It was post-dated 18th July, 1906, the date of the original verbal agreement.

The plaintiff was still in possession on 13th January, 1908, when she instituted this action, as well as at the time of trial.

I may also say at once that $1,195 was paid under the agreement, being the full purchase price less $5.

The plaintiff in her statement of claim, after setting forth the verbal agreement as above given, alleges that the defendant at the same time "gave to the plaintiff a memorandum in writing signed by him setting out the particulars of the house which he would erect for the plaintiff, the said defendant agreeing with the plaintiff that the said house when erected would be worth $800 and would be a substantial habitable dwelling;" that she signed an agreement for sale on 4th October, believing it to be, as represented to her, a document required for the completion of the loan of $700 above referred to: that the defendant knew that she was ignorant in the construction of buildings and that she was relying on his good faith; that the said house is not worth $800, is not according to specifications, valueless as a habitable dwelling, and that the defendant's representations were false, fraudulent, and deceitful. She prays for rectification of the agreement of sale so that it will contain the whole of the terms of the contract, specific performance of the contract as rectified, damages, and further and other relief. Under an amendment to the statement of claim, she also alleges that the defendant has refused and still refuses to rectify the said agreement, to perform the same as rectified, and to allow her a reasonable sum as damages for his misrepresentations.

The defence is to the effect that the agreement was to put up a wooden building according to a written estimate, and that he, the defendant, has done so; that the agreement for sale executed by defendant on 4th October, was so executed in pursuance of their original understanding, and when the said building had been completed and the plaintiff had accepted the same and taken possession thereof; that he has ever been ready and willing to carry out the contract on his part, but that the plaintiff has failed to make the payments agreed upon, and has never demanded or tendered any conveyance to be executed by him. He relies also on the 4th section of the Statute of Frauds, and counterclaims the unpaid balance of the purchase price, which at the time of trial was admitted to be $5.

I find that the broad basis of the agreement was that the lot was being taken at $400 and the two buildings (i.e., the shack already in existence and the house to be built), at $800. I so find on the evidence of the plaintiff herself, who in this respect contradicts the allegation of her statement of claim that the new house by itself was to be worth $800, also on the evidence of her daughter, but especially on that of Mrs. Tolland, with the earnestness of whose testimony I was impressed, and who stated insistently under cross-examination, "The lot was $400, and the two buildings at $800." The lot had, moreover, cost the defendant $400 a month or two before, and could hardly have acquired much value in that brief space of time.

I also find, in the words of Mrs. Tolland, which are a little different from those used by the plaintiff and her daughter, that the defendant promised to build "a good, warm, and comfortable house."

As to the memorandum of specifications, it is a crude and incomplete document, lacking in almost every particular which would differentiate a comfortable building from the most rudimentary shack. One of the witnesses, a practical builder of considerable experience, says, "It is no specification at all, because it isn't there,"—and he explains that it fails to provide for the essentials which go to make up any building of whatever class. Another witness says of the same document that "the material isn't there," that "you cannot build a dwelling of any kind on that," that "you might put up a coal house or a hen house on it, but not a dwelling house." The defendant's evidence does surely not seek to support that part of his statement of defence from which it would appear that it constitutes substantially the whole agreement. He refers to this document simply as "a rough statement." After expressing uncertainty on the point, he says he read it over to the plaintiff; but I am sure that it would convey very little to the mind of the average woman, and much less to that of the plaintiff's evident inexperience of such matters. It does not appear to me that it should be considered an essential part of the agreement, and I am sure at all events that whatever consideration was given to it, was so given on the assumption that a house built on those lines would be "a good, warm, and comfortable house."

I have already found that the two buildings were to be worth $800. What was the value of the shack at the rear?

Bannister and Merrick, who are carpenters of considerable experience, put it at $150 and $225 respectively, and I gather from the evidence of Lawrence, another carpenter, that he would not go beyond $200. There was no evidence called by the defendant on this point, but the defendant himself puts it at $300. I will place it at $250 as an outside figure, which leaves $550 for the new house.

We thus have a contract for "a good, warm, and comfortable house," in the words of Mrs. Tolland, or "a substantial habitable dwelling," in the words of the statement of claim, such as could reasonably be expected to be built for about $550. The specifications may be given consideration to determine some particular point of construction, but not, I think, to vary the contract so expressed.

I find that the new house did not cost $550, even including the plaintiff's labour and time, and that owing to defective workmanship and unsuitable material it is not worth what it cost. The defendant himself says that he did not intend going beyond $400, as he valued his lot at $500 and the old shack at $300.

Mrs. Tolland says: "It was pretty bad in winter—they were up to their ankles in water running down from the sides of the walls and roof . . . I'd call that a good wood shed down east, I wouldn't call that a house. . . I could not have stayed in it—water was coming so bad from the walls that it was running out, and as high up as your ankles on the floor. . . All that was in the bedrooms was spoilt. . . They came several times to my place, for protection almost."

I also take the following extracts from the evidence of 4 contractors, all practical men, one of whom has had 11 and another 31 years' experience: The roof has no cornice and nothing to prevent the water from coming in—The roof is too flat and not given one inch to the foot—The windows are storm windows cut in two to make sash windows—The sheeting under the frieze board is cut square, not rabbited, and allows water to run in—The floor is pretty poor stuff, ship lap, and the edges all turned up on account of not having enough nails—The cellar is not cribbed, and caves in—The material on the roof is not rubberoid as called for—I would call that a shack, not a cottage—As to making it a nice substantial comfortable house, it cannot be done—It would have to be torn all to pieces to get to the joists, which are too light—It would require extra rafters—The roof is on the rafters,

and the ceiling is nailed to the rafters, which is the worst kind—I don't call it a good job, not a good honest job; I call it a poor job—I call it a swindle—The windows are not uniform, and they don't fit—The ceiling is common boards, and the heat goes through and causes frost to collect—When I saw the house in December, they had milk pans and other vessels to catch the droppings from the roof and to protect the beds; also boards to walk on; and the paper was all hanging down from the damp and frost—The covering of the roof is two-ply tar paper—The ceiling is no ceiling at all; it is the worst kind of ceiling to collect frost—You can see right through the rough ceiling—The floor is ship-lap, very inferior —warped considerably in the bedrooms—I never saw a floor on joists 2 by 4—The studding three feet apart is too far apart; I never use that—The sash cannot keep the cold out —The window frames are very poor—There is no casing at all inside—The general workmanship is what we would call jack-knife job—not workmanlike at all—It's like a stable and shack in the country, run up for temporary use—I don't call the front building a house—It might be a good chicken or pig pen if the partitions were taken out of it—To make it habitable, well, you could not do it without tearing it down to pieces—I would consider I was swindled if I got a house built on those specifications—I have used thousands of rolls of rubberoid, and this is not rubberoid—As a dwelling-house it is very hard to say what it is worth, as it is practically not a dwelling-house at all—The paint is peeling off, indicating poor material—I never saw a house constructed with floor on 2 by 4—This roof is not a roof for a habitable house—There is no front door at all—The siding is not fitted up close enough.

George Sturdy, a carpenter called by the defence, although giving evidence more favourable to the defendant, says that "the workmanship is not first-class, surely not." And with respect to the floor being built on joists 2 by 4, he says: "I was surprised. It is not a good substantial floor."

Harold Beebee values this building at less than $200; Albert Bannister at $100; Isaac P. Merrick at $300; and George Sturdy for the defence at $300 or $350. I believe that on the whole of the evidence, $300 may be considered a fair value. As stated, it should be worth $550.

As to taking possession. It appears that about 3 weeks after the building was commenced, the defendant, when about

to leave for his homestead, told the plaintiff that she could go in, and left the key with her. She says that she looked in, and that, having seen the condition of things, she would not take possession. Later, however, a week later perhaps, one Mr. Coles went to the plaintiff, and, on the authority of a letter received from the defendant, told her to go into the house, and that the defendant would do all that could be done to make her comfortable. The plaintiff then went in, believing, as she says, that "he would fix it up later on." She also remarks that she could not say, then, how it would bear the weather. According to the defendant's own evidence, the building was not complete then, for he admits that the painting and the chimney were not done There is one thing, however, to which it seems the plaintiff committed herself by her conduct, and that is the style of flat roof called "shanty roof," which she could not but see and believe to be permanent.

Some time after, the defendant, having come back from his homestead, finished the painting and the chimney.

The next stage was the signing of the deed of agreement on 4th October. The plaintiff had her daughter with her on that occasion. I am of opinion that the plaintiff well understood the general nature of the document, i.e., that it was an agreement providing for the sale of the property in question. She says herself in the course of her examination for discovery: "When I signed this paper or one like it, I said, 'Well, I will just leave it to you, I do not understand anything about the house.' The evidence of her daughter would go to shew that they were then satisfied; but the fact that they were satisfied is evidence in itself that their inexperience rendered them unaware of the condition of things which the winter season would open their eyes to. This does not apply to the style of flat roof as distinguished from a cottage roof, nor possibly to the cribbing of the cellar. But I refer to the general conditions of construction which made the house not a habitable house in winter. The main point, however, is that she signed the agreement with an understanding of its nature and import.

In the following winter, the plaintiff had the experience above referred to, and on 13th January, 1908, brought action.

Is this a case for rectification of the agreement for sale? I do not think so. In Green v. Stevenson, 9 O. L. R. 676, 5 O. W. R. 761, the authorities are reviewed, and it is laid

down that before there can be rectification, there must be evidence of a common intention that the document to be rectified should contain the whole of the contract and that the omitted terms were left out by fraud or mutual mistake. The plaintiff's daughter says that they were satisfied at the time, not being aware of the latent defects. This was no longer an agreement to do certain work; but an agreement for the sale of a thing which the parties considered and dealt with as if completed. Even if she had been assisted by a solicitor, what more would she have asked at that moment than a promise for sale of the lot, which carried with it the new building with which she was satisfied? Nothing in the contract was omitted by mutual mistake; unilateral mistake, if there had been such, is no ground for rectification (Kerr on Frauds and Mistakes, p. 463); and it was not the common intention (and not even her intention) that the contract should contain the provision as to the building being a warm habitable house, for the reason that she thought it was actually such. At that time, I held, she considered her house complete as far as the contract went with respect to the conditions which would make it a substantial, habitable house, and the position of the parties seems to me, on this point of rectification, the same as if there was an actual conveyance instead of an agreement for sale.

But there was a misrepresentation throughout that the house was a nice, warm, comfortable house, which, in my opinion, entitles her to damages, and the 4th section of the Statute of Frauds is not a bar to her bringing in oral evidence to shew what the parties contemplated that the character of the subject matter of the contract should be.

I find there was a fraudulent misrepresentation made by the defendant, in which ever way the matter is looked upon. If the specifications did form an essential part of the agreement, the misrepresentation was in inducing her to believe that a house built on those lines could and would be a nice, warm, habitable house; if the specifications were a negligible quantity in the negotiations, then the deceit was in inducing her to take possession, as the defendant did, when the house (besides being wanting in less important details) had permanent defects which already made it impossible for it to be a building as contracted for. It was a misrepresentation; it was false; the defendant knew it was false; he made it with

the intention that the plaintiff should act upon it; the plaintiff acted relying upon it, and she has suffered injury thereby.

In Dobell v. Stevens, 27 R. R. 441, where the vendor of a public house made, pending the treaty, certain deceitful representations respecting the amount of the business done in the house, and the rent received for a portion of the premises, whereby the plaintiff was induced to give a large sum for the premises, it was held that the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises or any written memorandum of the bargain which was drawn up after these representations were made. In Attwell v. Small, 6 Cl. & F. 232, where action was brought to rescind a contract for the sale of mines, on the ground of misrepresentation as to returns and capabilities, the action was dismissed on the ground that no fraud or deceit had been proved, but Lyndhurst, L.C., said (p. 394): "I take the law to be clearly settled, and I venture to state it to be this, that where representations are made with respect to the nature and character of the property which is to become the subject of the purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, the foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised, and in a court of equity a foundation is laid for setting aside the contract which was founded upon a stipulated basis."

The plaintiff's remedy in this case might then be either rescission, which she does not ask, and which probably could not be granted on account of the length of time of her occupation before action, or damages.

I believe that the prayer in the statement of claim for "damages for misrepresentation," is wide enough to cover the relief which could have been granted under an action for deceit, which was the other alternative in case of a sale of land where rescission might be but was not prayed for.

I am consequently of opinion that the defendant is entitled to succeed for the misrepresentation, and I will allow her on the basis of the figures above set forth, $250.

The plaintiff also prays for rectification of the document, on the ground that the lot contemplated by the parties (and in fact the one on which the two buildings are situate and of which the plaintiff has taken possession) is lot 41 in block

313, and not, as stated in the agreement, lot 41 in block 314. This is shewn to have been a mere clerical error which the defendant was never called upon to correct. The agreement will be rectified accordingly.

As to specific performance of the agreement for sale, rectified as it is ordered to be only with respect to the description of the property, the only performance it can call for is of course conveyance of the property.

It was not incumbent upon the purchaser to prepare and tender a conveyance, but it is the vendor's duty to prepare and execute the same at his expense: Stephens v. De Medina, 4 Q. B. 425; Dysart v. Drummond, 7 Man. L. R. 68.

The plaintiff, however, still owes the defendant $5 on the purchase price. By the manner that the evidence of the payments made from time to time by the plaintiff was put in, I would judge that the parties hardly knew at first how their accounts stood. The defendant first claimed $30, and finally reduced it to $5. The plaintiff surely intended to pay the full amount, whatever that might be, as shewn by letter, exhibit "J." This possibly would not be a sufficient answer in all cases; but I think that in the present one, this small amount may be set off against the damages awarded, and specific performance in the way indicated ordered.

There will be an order for the payment to the plaintiff by the defendant of $245; also, for rectification of the agreement for sale with respect to the description of the land therein set forth; and for specific performance by way of conveyance, and in default vesting the land in the plaintiff; with costs to the plaintiff.

SASKATCHEWAN.

NEWLANDS, J. JUNE 27TH, 1908

TRIAL.

SMYTH v. CANADIAN PACIFIC R. W. CO.

Railway—Taking Gravel from Land Adjoining Right of Way—Trespass—Maintenance of Road—Railway Acts—Rights of Homesteader—Dominion Lands Act—Damages—Spur Line Built across Land.

Action by a homesteader for trespass. The plaintiff charged that the defendants took and carried away gravel from his homestead.

C. E. Armstrong, Moose Jaw, for plaintiff.

W. B. Willoughby, Moose Jaw, for defendants.

NEWLANDS, J.:—On 22nd March, 1905, the defendant company surveyed a branch line across the north-west quarter of section 4, township 16, range 13, west third meridian, to a gravel pit on property of their own. The line was afterwards located and the track laid and put in operation by 24th July, 1905.

The plaintiff, on 5th August, 1905, made a homestead entry for said north-west quarter of section 4, township 16, range 13, west third meridian. At that time he did not know that the defendant company's tracks were on his land, nor that they had opened a gravel pit on it. In the following spring he had the lines of his homestead surveyed, found that the company's tracks were across his land, and that they were taking gravel from a pit located partly on his land and partly on their own land. On 2nd June, 1906, he sent the company the following letter: "Upon having the lines of my homestead, which is north-west quarter of section 4, township 16, range 13, west of third meridian, marked out, I find that your company has stationed its gravel pit upon it, and is now removing gravel from my land. No doubt, this has been done inadvertently through an oversight, but naturally I do not wish to have gravel removed, and my homestead disfigured. This letter will, therefore, notify you to cease removing gravel from the above described property, and to remove your tracks and other paraphernalia, unless arrangements can be made with me. With regard to the damage which has already been done, and the gravel which has been removed, I will communicate with you later. Yours truly, W. Oswald Smyth."

This notice was received by the defendants' station agent at Swift Current, and by him sent to the superintendent at Moose Jaw. The defendants took no notice of this letter, although they shortly afterwards, on 13th June, 1906, ceased taking gravel from the plaintiff's land until the following spring, when they commenced to take gravel again from plaintiff's land, and did not cease until this action was commenced, and they were stopped by injunction. The plaintiff in the meantime wrote the company on 8th June, 1907, the following letter: "Last year I notified you to cease taking gravel from my land which you are using as a gravel pit near

Aikens. I am informed that you are at present taking gravel from this land at an enormous rate, and I again notify you to cease these operations until such time as a settlement has been made with me. For all gravel which has so far been taken I shall charge you at the rate of $1 per car load, and if any more is taken after the delivery of this letter, I shall charge at the same rate, and shall consider your taking the gravel as an acquiescence in this price. This letter is not to be construed as giving you permission to take this gravel, but simply as a protection to me until such time as I can come to an agreement with your company, or until proper proceedings can be taken before the courts to protect my interests. Yours truly, W. Oswald Smyth."

This letter was also received by the company's agent at Swift Current, and forwarded by him to the superintendent at Moose Jaw. No notice was taken of this letter either.

The defendants justify what they have done under several Acts of Parliament, and contend that if they took this gravel they were entitled to do so under those Acts.

The first statutory provision referred to is sec. 19 of schedule A to 44 Vict. ch. 1, which authorizes the company to take from adjacent public lands gravel, etc., for the construction of their railway. The evidence at the trial shewed that this gravel was being taken for the maintenance of their right of way. I do not think that any such construction can be put on the word "construction," as used in this section, as to make it include maintenance.

The next section referred to was sec. 14 of their contract attached to 44 Vict. ch. 1. This section gives them the right to lay out, construct, maintain, &c., branch lines, provided that before commencing they deposit certain plans. No evidence was given that this section had been complied with, so that I do not think they can justify under it.

They also referred to sec. 9 of the Railway Act, 42 Vict. ch. 9, but, as this section also refers to the filing of certain plans, &c., which was not done so far as the evidence shewed, I do not see how it can help them.

The sections of the different Railway Acts requiring notice to be given and the action to be brought within a certain time, were also referred to, but were not pressed, as it was apparent from the evidence that the notice was given and the action brought within the time provided by these Acts.

The plaintiff's rights as a homesteader are set out in sec. 111 of the Dominion Lands Act, which reads as follows: "The entry for a homestead and for its attached pre-emption, if any, shall entitle the recipient to take, occupy, and cultivate the land entered for, and to hold possession of the same to the exclusion of any other person whomsoever, and to bring and maintain actions for trespass committed on the said land, the title to the land shall remain in the Crown until the issue of the patent therefor, and the land shall not be liable to be taken in execution before the issue of the patent." The plaintiff had, therefore, the exclusive right to this quarter section, and the defendants are trespassers since the time he gave them the first notice on 2nd June, 1906, and he is entitled to recover from them damages for the trespass committed.

Considerable evidence as to what damages should be given was put in. It was contended by plaintiff that defendant had sold a considerable quantity of gravel at 25 cents per cubic yard. I cannot allow damages on this basis, because I have no doubt that though a yard or a few hundred yards might be worth 25 cents cash, it cannot be considered the value of the gravel in large quantities, and the local demand other than for railway purposes must be very limited. On the other hand, I do not think that the actual value of the land for farming purposes should be taken as the value. For the purposes of ballast it might be fairly put at one cent per yard, which is the highest value the defendants' witnesses put on it, and I will, therefore, allow the plaintiff $590 damages.

Plaintiff also contends that 3 acres are useless to him on account of spur built across his land and asks that defendants be required to remove the same or pay him its value, 3 acres at $30 per acre, namely, $90. I think this is fair, and the order will be accordingly.

As to the defendants' counterclaim, there was no evidence that plaintiff damaged them in any way.

SASKATCHEWAN.

WETMORE, C.J. JUNE 29TH, 1908.

CHAMBERS.

RE MUSSETTER.

Distribution of Estates—Claims against Intestates' Property in Hands of Administrator—Affidavit—Jurat—Practice—Solicitor's Account—Evidence as to Services Rendered—Notice to Administrator of Claim—Proceedings to Establish—Action—Originating Summons—Rules of Court—Reference—Distribution of Surplus—Next of Kin.

Application by the administrator of the estate of William A. Mussetter and Lathrop Mussetter, under Rules 481 (3) and 495 of the Judicature Ordinance, for the opinion and advice and direction of the Court respecting certain matters arising in the administration of these estates.

T. S. McMorran, Regina, for the administrator.

A. L. Gordon, Regina, for the next of kin and for McCafferty.

WETMORE, C.J.:—The matters which I am requested to consider under the summons are to determine who are the parties entitled in distribution, and to determine on the validity of certain claims filed against the estate and the distribution of the surplus.

At the return of the summons it was stated that there was only one disputed claim remaining in controversy, that the other disputed claims had been abandoned. The claim in controversy is that of one McCafferty, who is an attorney practising in the State of Washington, in the United States of America. He professes to have a claim against both deceased parties jointly, and against Lathrop Mussetter's estate separately. Apparently the claim against the deceased parties jointly is entirely separate and distinct from the one against the estate of Lathrop Mussetter.

The only evidence in support of these claims is the affidavit of McCafferty, which is not at all in accordance with the practice of the Court. In the first place, it is not in-

tituled in the Court or matter, and McCafferty does not give his place of residence, as the practice requires, in his affidavit, and the jurat to the affidavit does not state where it was sworn; it purports to be sworn before a notary public for the State of Washington, residing at Seattle, but the jurat does not state where it was sworn. These matters, however, are matters entirely of practice, and possibly of a technical character, and I will give my attention therefore to the merits of this affidavit.

In my opinion, the facts set forth in such affidavit are not sufficient to warrant the administrator in paying this claim at present. The amount claimed against the joint estates is $703. He asserts that the full amount was $1,100, but that an account was stated or settled between himself and the Mussetters by which it was adjusted at $703. The adjustment of this account is very vaguely set forth. I am quite unable to ascertain by which of the Mussetters it was adjusted. I cannot come to the conclusion, in the way the matter is set forth, that it was adjusted by both of them. There are no items setting forth how the account was made up, and I am of opinion that, in view of the fact that this was a claim against deceased persons, that should be set forth. The commencement of the account dates a long way back; he says that his papers were burned, having been left behind him when he moved from the city of St. Paul to Seattle, and that they were burned because it was the habit of the janitor of a block in which they were kept to destroy papers at the end of every 6 years. I may say, it strikes me that this gentleman could not have had very great regard for these accounts if he left them under such circumstances to be burned. Then as to the account against Lathrop Mussetter; he does not pretend to have kept accounts of the items of this charge. He does not shew the items of the amount claimed; it was stated to be for consultations held through the years 1902, 1903, and 1904, which he has lumped at $1,000; but in the generosity of his heart he is willing to take $500. There are some other items, which perhaps are more satisfactory, for preparing contracts and powers of attorney. I am of opinion that the amounts charged for these last mentioned services are very excessive. I may say, moreover, that the affidavit does not state what is required by Rule 596 of the Judi-

cature Ordinance, inasmuch as it does not state whether or not he holds any security for his claim or any part thereof.

The next question is whether, in view of what I have stated, I can direct the administrator to disregard this claim and distribute the surplus to those entitled thereto as if the claim had not been presented. I am of opinion that I cannot do that. There is no provision in Rule 595 of the Judicature Ordinance which warrants that being done. That Rule provides for an application for an order for creditors to send in their claims, and for the publication of it, and all that has been attended to in the matter of these estates; but I can find nowhere that the administrator is authorized, if a declaration is not put in as directed by the Rule, to distribute the surplus property regardless of the claim, if as a matter of fact he has notice of it. If he has no notice of the claim at all, then, undoubtedly, he is authorized by the Rule to distribute, but, if he has, I am of opinion that that cannot be done. The Rule provides that the administrator, on notice being given and published as directed by the Judge, "may at the expiration of the time so fixed be at liberty to distribute the assets of the testator or intestate or any part thereof . . . amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof . . . so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution." Now, it cannot be said that the administrator has not had notice of this claim. The Trustee Ordinance (ch. 11 of 1903, 2nd session), sec. 45, it seems to me, provides the course for the administrator to take under such circumstances. That section is as follows: "In case the executor or administrator gives notice in writing, referring to this section, of his intention to avail himself thereof, to any creditor or other person of whose claims against the estate he has notice, or to the advocate or agent of such creditor or other person, that he, the executor or administrator, rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within 6 months after the notice is given, in case the debt or some part thereof is due at the time of the notice or within 3 months from the time the debt or some part thereof falls due if no part thereof is due at the time of the notice, and in default the claim shall be forever barred.

"(2) Unless such creditor or other person, within 10 days after the receipt of such notice, notifies the executor or administrator that he withdraws his claim, such executor or administrator may, if he thinks fit, apply to a Judge of the Supreme Court for an originating summons calling upon such creditor or other person to establish his claim, and upon the return of such summons the Judge may allow or bar the claim or make such other order as to him may seem meet with or without costs against either party."

Upon the administrator giving the notice provided for in that section, and if the alleged creditor should notify him as therein provided, he may apply to a Judge for an originating summons, and the Judge may then allow or bar the claim as he thinks proper; or if the alleged creditor does not proceed as required by par. 1 of the section, the claim may be ipso facto barred. It was contended, however, that I had power to determine the question of the right of this claimant to rank upon the estate by virtue of par. 3 of Rule 481. That is practically the same as Rule 3 (par. a) of Order LV. of the English Rules, and it was laid down in In re Powers, 30 Ch. D. 291, that this paragraph does not apply to the case of a disputed debt, where the dispute turns on matters of fact. That was laid down by the Court of Appeal in England, consisting of Cotton, Lindley, and Bowen, L.JJ., all the Judges concurring; and I think that this is the law. Moreover, it seems to me to be accentuated by the provisions contained in sec. 45 of the Trustee Ordinance, to which I have referred.

I will order a reference to the clerk to inquire into the accounts in this case, and report, but not to allow the claim of McCafferty; and that the administrator distribute the surplus estate, if he thinks it prudent to do so at present, having regard to the claim of McCafferty.

The only remaining question for me to decide is, who are entitled in distribution to the surplus of these estates? I hold that the living uncles and aunts of the deceased and their nieces, children of their brother Frank, deceased, are entitled, share and share alike, in this distribution. The uncles and aunts are Reuben S. Mussetter, J. W. Mussetter, C. H. Mussetter, G. S. Mussetter, Mrs. V. Ingraham, Mrs. Sarah M. Dorland, and J. H. Mussetter, and the nieces are Misses Margaret Mussetter and Helen Mussetter.

YUKON TERRITORY.

JUNE 16TH, 1908.

FULL COURT.

YUKON CONSOLIDATED GOLD FIELDS CO. v. SCHMIDT.

Mines and Minerals—Water Grants—Construction of Ditch by Plaintiffs—Hydraulicing Placer Mining Claims—Location of Ditch — Plans and Surveys—Ditch Crossing Defendant's Claim—Trespass—Destruction of Flume—Waste of Water—Representation Work—Right of Grantee to Attack Grant to another — Rights of Defendant as Prior Locatee—Crown Regulations — Evidence—Injunction—Damages.

Appeal by defendant from judgment of CRAIG, J., 6 W. L. R. 592.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. T. Congdon, for defendant.

J. B. Pattullo, for plaintiffs.

MACAULAY, J.:—The first question raised on this appeal was the contention submitted on behalf of the appellant that her mineral grant of 1st June, 1903, being prior to the water right granted on 23rd July, 1903, to Ellen Acklen and Douglas Mackenzie, was not affected by the water regulations, and I will deal with this point first.

All the mining regulations were passed under the authority of sec. 47 ch. 54, R. S. C. 1886, known as the Dominion Lands Act, which delegated to the Governor in council the power to make regulations for the disposal of mining lands.

Water is generally so absolutely essential to mining that the regulations which have been passed from time to time respecting water for mining purposes must be considered as regulations authorized by said sec. 47. The regulations affecting the disposal and use of water passed in 1898 for the Yukon Territory, must be taken to apply to both quartz and placer mining, and, under sec. 78 of the Quartz Regulations, in force at the time of the appellant's staking of her

mineral claim, her rights acquired at that time were subject to the public rights of way and water, and I think it was clearly the intention of the legislators that all mining claims should be subject to the public rights of way and water, and I am of opinion that all mining claims in this Territory are so subject.

Objections were raised on the argument before us to the sufficiency of proof offered at the trial of the plaintiffs' water grants Nos. 5555 and 8121, and also of the defendant's record of the "Anlas" mineral claim No. 6701, and the certificates of work on the same for the years 1904, 1905, 1906, and 1907, and, by consent of counsel for plaintiffs and defendant respectively, copies of the grants, records, and certificates were put in before us and were to be taken as if the originals had been produced and proven at the trial; and therefore it is admitted that the defendant's right to her mineral claim is in good standing, although she has not yet obtained a Crown grant for the same under the Quartz Regulations.

By water grant No. 5555 dated 23rd July, 1903, the Minister of the Interior granted to Ellen Acklen and Douglas S. Mackenzie, for the term of 10 years from the date thereof, "the right to divert and use the water from Moosehide Creek, the point of diversion being near the head thereof, thence in a westerly direction along left limit of said Moosehide Creek, tapping and taking therefrom all water contained in the intervening streams and watercourses, to the westerly side of the mountain north-east of Dawson, and thence around the said mountain in a southerly direction to the mining claims mentioned in exhibit A attached to such grant, marked along the route of ditch by conspicuous posts planted about every seven-eighths mile along the proposed location of the ditch or flume or pipe or both."

Section 4 of the Water Regulations provides, among other things, that "the grant shall be in the form N in the schedule thereof." By order in council of 31st March, 1903, and prior to the staking of the "Anlas" mineral claim, form N of the regulations established by order in council of 3rd August, 1898, was rescinded, and the form N provided by order in council of 31st March, 1903, was substituted therefor. Amongst other changes, the words in brackets "(insert description)" in the first form, are not in the second, but I cannot see that this makes any material difference, as the description of the mining grounds over or

through which the contemplated ditch is to run, is intended to be given in the water grant.

Water grant 5555 was issued according to form N of the Regulations established by order in council of 3rd August, 1898, except as hereinafter mentioned, and not in the form N established by order in council of 31st March, 1903, which was in force at the date of the grant.

No explanation as to the form of grant used is made to the Court, but the most likely explanation would be, as most frequently occurs in this Territory, that the change in the law was not known here at the date of the issue of the grant 5555, owing to the isolated position of this Territory and the difficulties of communicating by mail which existed here at that time, and still exist.

Water grant 8121, issued on 24th January, 1907, followed the form in schedule E of the Yukon Placer Mining Act, R. S. C. 1906 ch. 64, except as hereinafter mentioned.

Neither of the above mentioned grants describes the course of the ditch over the "Anlas" mineral claim, but in grant No. 8121 the following description is inserted: "And the right of way and entry upon the following mining grounds—in or through a ditch or flume or pipe, or all three, through the ditch constructed and known as the Acklen ditch to point of use, for the purpose of constructing ditches and flumes to convey such water, provided that such ditches and flumes are constructed from the date hereof." The first grant provides for 1,000 inches of water, and the second grant provides for 1,200 inches of water, but from different sources.

It was contended on behalf of the appellant that the grants were void, as there was no evidence that the 20 days' notice of the application for water grants had been given under sec. 2 of the water regulations, and that the onus was on the plaintiffs to prove that the grants were regularly issued.

Section 114 of our Judicature Act provides as follows: "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleadings."

The defendant did not, in this case, specifically deny that any conditions precedent to the obtaining of the grants had been fulfilled, or did not plead that the provisions of sec. 2 of the Water Regulations had not been complied with, and, consequently, we must presume that the grants which are produced were obtained regularly, and that the conditions precedent thereto had been fulfilled.

Section 4 of the Water Regulations, amongst other things, states that the grant shall be in the form N in the schedule thereof, and sec. 57 of ch. 64, R. S. C. 1886, provides that a water grant shall be in the form in schedule E to that Act; and it is argued that both grants are void, as they were not issued in the form prescribed by the statute. In support of this argument are cited the cases of Thomas v. Kelly, 13 App. Cas. 506, and Reid v. Creighton, 27 N. S. R. 90, affirmed in Supreme Court of Canada, 27 S. C. R. 69. Both these cases were under the Bills of Sale Act, which provided, in the first case, that the bill of sale should be in accordance with the form in the schedule to the Act, and, in the second case, that the affidavit should be in accordance with the schedule in the Act; otherwise, in both instances, the instruments should be void, and in both cases they were held void.

These Acts were passed for the prevention of fraud on creditors, and I can see nothing contained in the Water Regulations or in the Yukon Placer Mining Act from which it could be inferred that these grants would be void and of no effect unless in the form prescribed. Again, the form prescribed must necessarily be altered to suit the different conditions arising under different grants, and I am of the opnion that the form is merely directory, and, if the description is otherwise sufficient, that the grants would be valid in that respect.

Under water grant 5555 the right of way is described as "around the westerly side of the mountain north-east of Dawson in a southerly direction to the mining claims to which the grant is appurtenant."

The trial Judge found as a fact, and in accordance with plan filed at the trial, exhibit "M," that the ditch followed the right of way under the grant and ran over the Anlas mineral claim on the mountain side; and, under water grant No. 8121, the right of way is described as "through the ditch known as the Acklen ditch," and I am of opinion that the water grants above mentioned, although not specifically

stating that they ran over the Anlas mineral claim, sufficiently described the course to be followed so that no claim owner could be misled, and in this case I am satisfied that the defendant was not misled by reason of the manner of the description of the watercourse to be followed, and I am, therefore, of the opinion that the grants in this respect are valid.

It was also argued that sec. 11 of the water regulations had not been complied with, as no compensation had been given defendant under that section. We have no evidence on this point at all. The defendant could have entered a protest under sec. 2, and the compensation could have been granted, but we have no evidence, and the inference to be drawn is that no protest was entered.

It is also contended that a 3 days' notice should have been given under sec. 13 of the water regulations before plaintiffs commenced to build their ditch over the defendant's claim. I have very carefully considered this section, and I cannot conclude that it was intended that this second notice should be given by the grantee of a water right to obtain the right to run his ditch across mineral claims, which right had already been given him by his water grant, unless in so crossing such mineral claim he would interfere in some manner with the working of the mineral claim. And the section also provides that the owner of the mineral claim must give 3 days' notice of his intention to approach within 4 feet of such ditch, if it be constructed; and in either case, under sec. 15, the Mining Recorder shall settle the amount of damage suffered.

I clearly think that sec. 13 contemplates an interference with some existing work on the one hand, or existing ditch or watercourse on the other hand, and is not a condition precedent to the plaintiffs' right to cross a mineral claim with their ditch where such crossing in no way interferes with any workings on the claim, and the right to so cross had been given him by his water grant.

It was also argued that the provisions of sec. 18 of the Yukon Placer Mining Act, ch. 64, R. S. C. 1906, had not been complied with.

Sections 54, 55, 56, 57, and 58 of this Act provide for the manner and means of obtaining a water right.

By sec. 55 twenty days' notice of the intention to apply for a water right shall be posted as therein provided, and,

by sub-section (c), "on each claim or person's land to be crossed by the water in course of transit to the place of user."

Section 56 defines the next steps to be taken by the applicant, and secs. 57 and 58 provide, amongst other things, for the adjudication of the rights of land owners or mine owners which will be affected by the grant.

No protest was entered by the defendant, as might have been done under sec. 57, and it must be presumed, under the circumstances, that the Mining Recorder did not consider it necessary for security to be given as provided for under sec. 18 of this Act.

It has also been argued that the ditch to be constructed under grant No. 5555 was not completed within the two years required by the terms of the grant, and, no extension having been given for its completion, the right had consequently lapsed. I am much inclined to think that this is a matter solely between the grantor and grantee, and undoubtedly, if an actual extension was not obtained, the further time required for the completion of the ditch was acquiesced in by the grantors; and, in any event, grant No. 8121 is a valid subsisting grant.

As to the merits of this case, the learned trial Judge has found as a fact, and I think his conclusions were wholly warranted by the evidence, that the acts of the defendant were malicious, and the mining operations pretended to be carried on by her were not bona fide acts of mining, or development work, of an asbestos mining claim, but were merely intended to embarrass the plaintiffs in the use of their ditch, and I am, therefore, of the opinion that this appeal should be dismissed with costs.

DUGAS, J., was of opinion that the appeal should be allowed, for reasons stated in writing, but at too great length to be set forth here.

In the result, the appeal was dismissed.

YUKON TERRITORY.

JUNE 16TH, 1908.

FULL COURT.

BANNERMAN v. DETROIT YUKON MINING CO.

Contract—Work and Labour — Building Ditch to Carry Water to Defendants' Mining Property—Time of Completion—Delay—Waiver—Extra Work — Acceptance — Payment — Tender — Counterclaim — Damages — Accounts—Reference—Costs.

Appeal by defendants from judgment of CRAIG, J., 6 W. L. R. 704.

The appeal was heard by DUGAS and MACAULAY, JJ.

Frank J. McDougal, for appellants.

George Black, for respondent.

MACAULAY, J.:—In this case the trial Judge found that the plaintiff was entitled to $380.57 for extras on his contract with the defendant, and this amount, added to the amount admitted to be due as balance of contract price, makes the total sum of $2,255.47 due the plaintiff. The trial Judge also found that the plaintiff had failed to fulfil the terms of his contract in many respects, and that the defendants were entitled to damages under their counterclaim for the losses suffered by them by reason of the plaintiff's default, but found that the evidence offered by the defendants was not sufficiently specific to enable him to estimate the amount of damages suffered, and directed a reference to the clerk of this Court to ascertain the amount of damages, unless the parties agreed to accept the sum of $250 in lieu of damages, which he suggested might be advisable. From this judgment the defendants have appealed, and the chief contention of counsel for the defendants on the argument before us was that the evidence adduced at the trial was sufficiently clear to have enabled the Judge to estimate the amount of damages suffered by the defendants. I have examined the evidence, and I cannot say that the sum of $380.57, found to be due

the plaintiff as extras, should be disturbed, and I agree with the trial Judge in his findings of fact, which are really not questioned on this appeal.

As regards the defendants' evidence on their counterclaim as to damages I am of the same opinion as the trial Judge, that the evidence is not sufficiently clear to enable me to estimate the amount of damages suffered, and I think the defendants should have proceeded with the reference as directed, with the single exception as to the item of $500 for lumber, which should be taken into consideration in taking the accounts. I think some of the expense incurred for lumber was necessarily incurred by reason of the plaintiff's default.

I am, therefore, of opinion that this appeal should be dismissed and the matter referred back to the clerk of this Court to take an account of the damages as directed by the trial Judge, with the variation in the direction as above indicated, and I am of the opinion that the defendants should pay the costs of this appeal.

DUGAS, J:—I am of the same opinion as Mr. Justice Macaulay.

There is no doubt that the plaintiff did not fulfil his contract in a proper manner, and I cannot see that the leniency shewn to him by the defendants should in any way cover his responsibility for his neglect. I believe that the defendants are entitled to whatever expenses they had to make to put the ditch in a proper working order as per the contract.

I agree with the learned trial Judge that the evidence of the damages suffered was not properly brought out before him, and that those damages should be established before a referee, and as ordered, with the exception for lumber expenses.

We have, therefore, to refer back the case to the lower Court for that purpose, leaving to any of the parties to take the order and proceed by default if the other one does not choose to act.

The costs of this appeal will be upon the appellants.

YUKON TERRITORY.

CRAIG, J. JUNE 18TH, 1908.

CHAMBERS.

RE PHISCATOR.

Executor — Compensation for Services—Jurisdiction of Territorial Court—Rules of Court—Passing of Accounts — Payments to Solicitors — Moderation of Costs — Payments to Agents for Services.

Petition by the executor of the will of Frank Phiscator, deceased, for an order allowing him compensation for his services, etc.

J. B. Pattullo, for the executor.

H. G. Bleecker and M. B. O'Dell, for the infant.

CRAIG, J.:—In July of last year the executor, by his solicitor, petitioned this Court to allow him compensation as executor, the petition setting out that he had filed an account of his administration with the clerk of the Court. With these papers he files his own affidavit setting out the work done by him, the employment of an agent by him, the employment of solicitors, attaching the agent's account, and, with it, filing a copy of the solicitors' account against the estate, which account asks for a bulk sum in lieu of all costs, together with the disbursements which are set out in full. The solicitors for the executor submit a very long and carefully prepared brief on the question of the jurisdiction of the Court and the matter of compensation, the amounts to be allowed, the right to employ agents, and the jurisdiction of the Court with respect to solicitors' bills paid by executors, and the passing of the executor's accounts. This brief is answered by Bleecker & O'Dell, solicitors for the infant, and they concur to a very large extent with the view of the law taken by the executor's solicitors.

In this Territory there is no Court of Probate or Surrogate apart from the Territorial Court, which exercises all the functions which would be exercised by a separate Court

of Probate, and the proof of wills and the issuing of letters of administration is done in the Territorial Court. So that all the proceedings in regard to the estates of deceased persons are carried on in the Territorial Court. Rule 608 provides that "the Public Administrator and all executors and administrators shall be entitled to such remuneration for their services as the Judge allows." This Rule is under Order 46, which Order covers probate and letters of administration. Our Rule 525, under Order 42, provides for costs generally, and is as follows: "Subject to the provisions of this Ordinance and the Rules of Court, the costs of and incidental to all proceedings in the Territorial Court, including the administration of estates and trusts and compensation or allowance to any executor, administrator, guardian, committee, receiver, or trustee, shall be in the discretion of the Court." I think these Rules themselves, apart from the inherent jurisdiction of the Court, give this Court full jurisdiction over the compensation of executors, as well as the passing of their accounts, which accounts include sums paid to solicitors and in connection with the necessary work of winding up estates. Apart from any Rule, I think the Court, of its own motion, having jurisdiction in the matter, might call upon executors to produce their accounts, either by citation or summons: see Accaster v. Anderson, 1 Rob. 672, and Brown v. Burdette, 40 Ch. D., particularly pp. 253 and 262; Williams on Executors, 9th ed., pp. 1768 and 1815; Lewin on Trusts, 9th ed., p. 298.

It is unnecessary for me to reconsider all the cases upon the question of executors' compensation. The law is very well established. The remuneration is based upon what is reasonable with regard to the value of the estate, the trouble and care and skill involved in its administration, and the result of the executor's work; and I might perhaps add that in this country, where costs for services are exceptionally high in everything, that might be taken into account as well. I am quite satisfied that I have authority to pass the accounts or to order a reference to the taxing Master to examine the accounts.

As to the solicitors' bill, I think a sum in bulk might be awarded, but it is impossible for me now, with the evidence before me, to say what sum would be fair, or whether any of the sums paid to the solicitors by the executor should be dis-

allowed by reason of the work being unnecessary or being done by a solicitor when it should have been done by the executor himself or some less costly agent, or whether negligence was shewn in the carrying on of any of the things done by the solicitors at the instance of the executor.

As to the compensation first. From the evidence before me, I think that the executor is asking too much when he asks $5,000 in this estate. Nearly all the work was done either by a paid agent, who received considerable remuneration for his services, or by the solicitors. So far as I know, the executor did nothing more than sign his name. It is true he came into this country, losing considerable time, in all, perhaps two months. His expenses are paid in full and are charged against the estate, which expenses are exclusive of the amount asked as remuneration. I think if he had performed very many of the services which the skilled agent performed, he might be entitled to all the compensation asked and more. But the judgment, skill, and time involved in the administration of this estate were all exercised and employed by an agent who has been paid for his services. The executor's remuneration, therefore, I think, should be reduced to $3,500. I think the sums paid to the agent are reasonable under the conditions existing in this country and the rates are not too high, and I think the executor was quite justified in employing the agent, on the evidence before me of the agent taken on oath.

As to the solictors' costs, they will be referred to the taxing Master of this Court, not to tax (because we have no tariff by which this bill can be taxed), but to consider the services rendered, and, if necessary, to examine the solicitors upon the matter, and, if thought upon the evidence that it should be done, to moderate the bill or to allow the lump sum asked for. The matter will be reported back to me after the consideration of the taxing Master.

The costs of this motion will be costs against the estate, of both parties appearing.

YUKON TERRITORY.

CRAIG, J. JUNE 22ND, 1908.

CHAMBERS.

TOSEO v. CAMPBELL.

Attachment of Debts—Moneys Attached Claimed under Assignment—Order Directing Trial of Issue — Parties — Mesne Assignee—Burden of Proof—Plaintiff in Issue.

Motion by plaintiff to make absolute an attaching order and garnishee summons.

Frank J. McDougal, for the plaintiff.

George Black, for the claimant John Black.

No one appeared for the judgment debtor.

CRAIG, J.:—The plaintiff has recovered judgment against the defendant, and now seeks to attach a sum of money owing to the defendant on a sale of certain property known as 21 below Discovery on Hunker creek, sold to one Joseph F. Burke, for whom the garnishee was acting as agent, and in whose hands the money was deposited or to be deposited.

The garnishee summons was issued and served on 2nd October, 1907, but did not come up for disposal until May of this year. At the time of the service of the garnishee summons, and as appears by the answer of the garnishee, the money was not payable until a certain blot on the title was cleared off, which was not done until this spring. The sale took place on 10th September, 1907, and on 12th September the defendant Campbell assigned the $500 balance, to be paid to one Annie M. Smith, as appears by an assignment (exhibit B), witnessed by George Black, and there is produced (exhibit D), a further order directing Burke to pay to Black & Black all sums payable to him on the purchase of the claim in question; whether that is the same sum or not does not appear except by the evidence of Mr. George Black. On the same day—the 12th September—Burke in a letter to

Black & Black confirms the arrangement that he is to pay over to Annie M. Smith the $500 as soon as a quit claim deed is furnished to remove the blot on the title. At the time of the service of the garnishee summons, then, Annie M. Smith appears to have beeen entitled, so far as the documents can give her title, to the balance of the money; but I find, by documents on file in the Court on a further garnishee application, that Annie M. Smith had some interest in 21 below, and was the agent of the defendant Campbell.

On 29th October, 1907, Annie M. Smith assigned over to John Black, of the firm of Black & Black, all her interest in the said sum of $500, and, as appears by the affidavit of George Black and his evidence, this money was assigned to pay a guarantee or debt which Annie M. Smith owed to John Black, collateral to a certain mortgage made by the said John L. Campbell to John Black.

The plaintiff asks that an issue be directed, and that will be granted.

The only other question remaining for consideration is the question of the parties. The plaintiff insists that Annie M. Smith be made a party, as the money appeared to be in her and the right to recover it on the date of the service of the garnishee summons. From the documentary evidence all her right has now passed to John Black. The plaintiff suggests that something is wrong, but won't say what; gives no affidavit suggesting any wrongdoing or collusion between John Black and Annie M. Smith; he says he wishes to get discovery from Annie M. Smith, and asks that she be made a party as well as John Black. I do not see that this can be done. Our Rule provides that "a Judge may order that any issue or question necessary for determining the liability or whether the debt is attachable, be tried and determined in any manner in which any issue or question in any action may be tried or determined, and may direct who shall be parties to such issue or question." The issue, of course, will lie between the party claiming the money and the judgment creditor. I cannot see what right the judgment creditor (or plaintiff) has to make Annie M. Smith a party to this action now. He seeks no recovery or judgment, and can obtain no recovery or judgment, against her. It is the fund in the hands of the garnishee that he is attaching, and the question

to be tried, and the only question to be tried, is as to who has the right to the fund or whether the money still remains the property of the judgment debtor. Certainly he cannot add Annie M. Smith for the purpose of discovery: see Wilson v. Church, 9 Ch. D. 552. Annie M. Smith now asserts no claim to the money. She is only one link in the chain of title passing the money to the present claimant John Black.

The issue then will be between the judgment creditor and John Black, the judgment creditor being the plaintiff in the issue, to try the property in the sum of money remaining in the hands of Joseph F. Burke or Thomas McGowan as his agent.

The costs of this motion will be determined on the trial of the issue.

YUKON TERRITORY.

CRAIG, J. JUNE 22ND, 1908.

CHAMBERS.

BARNARD v. FREEMAN.

Attachment of Debts—Gold Dust Delivered to Garnishee in Parcel to be Handed to Judgment Debtor—Whether Garnishable under Rule of Court.

Stated case arising upon a garnishee summons.

F. G. Crisp, for plaintiff (judgment creditor).

M. B. O'Dell, for Daniel Kearney, the garnishee.

CRAIG, J.:—This matter is submitted to me on a stated case, by consent, upon the affidavit of the judgment creditor and the examination of the garnishee.

The plaintiff has a judgment against the defendant, and on 12th May, 1908, issued a garnishee summons against the garnishee, upon an affidavit stating that he was informed

and believed that a certain poke containing gold dust had been shipped to him for the defendant. No evidence as to the amount contained in the gold sack is given in the affidavit of the plaintiff. The garnishee, being examined, swears that he did receive a package said to contain gold dust to be handed over to the defendant. He did not know what it contained, made no examination, and was not able to ascertain from the feel of it that it did contain gold dust, but accompanying the sack was a way-bill reading as follows: "One sealed poke said to contain 11¼ ounces gold dust from Sampson, from 72 B. L. Dominion; charges 50 cents." The defendant had not made any claim for the sack or parcel before the service of the garnishee summons, so far as appears by the evidence, and only after the service of the garnishee summons did he call and was told that a parcel was there for him; he did not take it away at that time, being informed of the garnishee summons; nothing was said by the parties at all as to the retaining of it or anything else; the man simply came there, learnt that a parcel was there for him, went away, and came back again and was handed the parcel, and gave a receipt for it in the following words: "Received from D. Kearney one sack said to contain 11¼ ounces gold dust received by him from 72 below Lower Discovery;" signed by the defendant.

Our garnishee Rule provides that "the service of a summons on the garnishee shall bind any debt due or accruing due from the garnishee to the defendant or the judgment debtor, whether such debt is payable in money or otherwise." The Rule was amended by adding the words "or otherwise," and it is argued that it does not matter whether the debt is payable in money or in any other material, it is equally garnishable. There is no doubt the Ordinance was so amended to meet the practice prevailing in this country of paying the wages of miners in gold dust, the usual provision in these cases being that miners were paid so much per day in gold dust, valued at so much per ounce, or in gold dust coming out of the claim on which they were working; but there was always a fixed sum of money owing which was payable in this specific way. However that may be, I would hold that if there were a debt arising ex contractu, this gold dust would be garnishable if there was privity and debt existing between the garnishee and the defendant.

It is argued that if this parcel containing gold dust had contained currency it would be garnishable, and therefore

it should not be exempt simply because it is gold dust. I doubt whether that would hold if a parcel said to contain so much money was delivered to the garnishee as a gratuitous bailee of it to deliver it on the payment of carriage charges; but I need not decide that question now. No doubt, if money is at law received for the use of another, it then becomes a debt and by implied contract is payable from the receiver to the one for whom he is trustee. But can it be said that specific chattels come under that ruling? The garnishee in this case was a gratuitous bailee of a parcel of goods. No pre-existing debt existed between him and the judgment debtor. If there had been, it would not matter whether it was payable in money or otherwise as the Ordinance provides. In this case the otherwise would be in gold dust. But it seems to me that there must have been some debt pre-existing or existing by reason of money had and received, between the garnishee and the debtor. Could it be said that a railway agent receiving a box said to contain so much goods of any kind would be garnishable, or any other bailee or receiver of goods not called for, liable to be stopped in transitu or recalled by the sender, would be garnishable? I do not think the Act goes that far. There must be a debt, and the best test is whether it would be the subject of set-off or not. In any event this parcel might have been recalled by the sender at any time before the garnishee had notified the defendant that he held it for him. The remedy is a purely statutory one, and I do not think it should be extended beyond the language of the statute and its intent. On this question see the cases of Caisse v. Tharp, 5 P. R. 265, and Webb v. Stenton, 11 Q. B. D. 518, and particularly at p. 528, the judgments of Lindley, L.J., and Fry, L.J. Very much was made in the argument of the words "or otherwise;" but I think the learned counsel wrongly applied these words in this case. The meaning of the words, I take it, is this, that a debt which is created to be payable in money or otherwise, may be garnished, but there must first be a debt created. Then it does not matter how it is payable, if the contract is that it is payable in money or in some specific thing the value of which can be ascertained or whch is to be delivered in kind in payment of the debt. It may be hard to work out that Rule in practice; but I do not think it goes so far as to extend to this case and to make goods in transitu of unascertained value, so far as the garnishee is concerned,

of unascertained or unknown value, in fact really unknown in kind so far as he is concerned except from hearsay, garnishable under this Rule. The judgment will be that there is no debt garnishable.

The plaintiff will pay the costs of the motion.

THE

Western Law Reporter

VOL. VIII. TORONTO, SEPTEMBER 1, 1908. No. 9

MANITOBA.

CAMERON, J. JULY 4TH, 1908.

GILLESPIE v. GILLESPIE.

Will—Legacy—Acceptance of—Liability of Legatee to Fulfil Conditions Imposed by Will—Parent and Child—Wages—Acquiescence.

Action by Ann Gillespie, mother, against James Gillespie, her son, to recover amounts alleged to be due under the will of the plaintiff's late husband, Archibald Gillespie, and for wages.

J. B. Coyne, for plaintiff.

W. M. Crichton and R. W. McClure, for defendant.

CAMERON, J.:—I should have preferred that an action of this unusual character should have been disposed of by some amicable settlement, but so far that appears to be impossible.

The defendant took possession of the personal property of the testator as legatee under the will of his father, and duly carried out the provisions of the same. The personal property in question was of no great value, but it seems beyond question that the defendant assumed the obligations set out in the will, one of which is the payment by him to his mother of $50 a year while she is living with him and $80 a year "if the said Ann Gillespie does not see fit or cannot live peaceably with the said James Gillespie:" Reese v. Engelbach, L. R. 12 Eq. 225; Gregg v. Coates, 23 Beav. 33; In re Williames, Andrew v. Williames, 52 L. T. N. S. 41; Attorney-General v. Christ's Hospital, 1 R. & M. 626; In re Skingley, 3 Macn. & G. 229; Messenger v. Andrews, 4 Russ. 478. As stated by Vice-Chancellor Bacon in the first mentioned case at p. 237: "Upon the authority

of the case of Messenger v. Andrews, and, even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he has enjoyed the benefits given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this Court, of fulfilling those conditions." I cannot accept the theory of the defence that the position of the defendant was merely that of an executor de son tort.

I must disallow the claim for wages. And I have no doubt the non-payment of the allowance prior to the time the plaintiff ceased to live with the defendant was with her acquiescence. It is not an easy matter to arrive at a satisfactory decision, because I must bear in mind that the defendant is a farmer in circumstances that cannot be considered opulent by any means. After much consideration I have arrived at the following as a determination of this unfortunate case: the defendant is to pay the plaintiff $500 on or before 1st November this year, and $250 in each year thereafter on or before that date during the lifetime of the plaintiff. As this is substantially the offer made by the defendant at the trial, I will not give costs. I still express the hope that the parties may come to an arrangement and resume the relations of affection which ought to exist, and that there will be no necessity for enforcing this judgment.

MANITOBA.

CAMERON, J. JULY 4TH, 1908.

TRIAL.

ALLOWAY v. RURAL MUNICIPALITY OF MORRIS.

Assessment and Taxes—Tax Sale—Sale of Unpatented Lands as Patented — Action by Purchaser to Recover Purchase Money and Amounts Paid for Subsequent Taxes—Voluntary Payments—Dominion Lands—Interest in—Powers of Provincial Legislature—Failure of Consideration—Treasurer of Rural Municipality—Powers of—Statutory Officer — Agent of Municipality—Advertisement—Warranty that Lands Offered for Sale Patented — Presumption — Caveat Emptor — Misrepresentation — Damages—Interest —Costs.

Action to recover moneys paid for lands at a tax sale.

A. B. Hudson and E. W. Marlatt, for plaintiff.

W. L. McLaws, for defendants.

CAMERON, J.:—The defendant municipality on 12th April, 1902, offered to sell to the plaintiff the lands in question, for arrears of taxes charged against the same, and the plaintiff offered to purchase them for $166.16. The plaintiff's offer being the highest bid, he became the purchaser and paid the defendants the $166.16. The lands had been previously advertised for sale in the Manitoba Gazette. The advertisement in the Gazette, signed "H. R. Whitworth, Secretary-Treasurer Rural Municipality of Morris," under the heading "Patented or Unpatented," had the lands in question listed as "Pat'd." The plaintiff paid the defendants for subsequent taxes for the year 1902, $111.25, and for the year 1903, $136.98. It is admitted that at the time of the sale the lands were unpatented. The plaintiff sues to recover the purchase price, subsequent taxes, and interest at 10 per centum per annum compounded. It is admitted that the treasurer of the defendants was authorized by the municipality, under sec. 159, R. S. M. ch. 117, to sell the lands, and that he published in the Gazette the advertisement to which reference has been made.

The plaintiff made an application under the Act to the District Registrar to obtain title to the lands, but necessarily failed in his application, and asks for his costs of such application.

Is the plaintiff entitled to recover the amount paid by him at the sale and the amounts paid for subsequent taxes? The defendants contend that these payments were made voluntarily, and that they are not recoverable. The defendants rely upon the case of Austin v. County of Simcoe, 22 U. C. R. 73. There it was held that where lands not assessable, no patent having issued therefor, were sold for taxes, the purchaser could not recover back the money in an action against the corporation of the county of Simcoe; that there was no contract between the plaintiff and the county corporation, who had nothing to do with the sale and could not control it; that the purchaser was acting on his own judgment and at his own risk; that the payment was voluntary; that the doctrine of caveat emptor prevailed; and that the municipality were not responsible. Under the law prevailing where and when Austin v. County of Simcoe was decided, it was the duty of the treasurer of the county to collect the taxes shewn to be in arrears by the collectors' rolls received by him from the treasurers of the various townships. The treasurer knew nothing of

the details except from the vouchers returned to him by the township treasurers, and was thereupon bound to issue his warrant to the sheriff. The sheriff then advertised the lands for sale (distinguishing patented from unpatented lands) and offered them for sale at the time appointed. It was held that moneys paid voluntarily to the sheriff, a public and independent officer on whom the duty is thrown by law, could not be recovered from the municipality. In the first place, it is to be noted that the statutory procedure set forth and discussed in Austin v. County of Simcoe is so different from that prevailing in this province, that decisions under it form no safe guide. In the second place, it was not, and could not have been, argued or held that any representation as to title had been there made by the municipality. All that the purchaser had reason to believe he was purchasing was "the interest" of the owner as at an ordinary sheriff's sale, and the only warranty was an implied promise on the part of the sheriff that he did not know that he was destitute of title. See judgment of Hagarty, J., at pp. 77, 78, 79.

On the other hand, the plaintiff contends that these moneys are recoverable. Plaintiff's counsel refers to Blackwell on Tax Titles, p. 1007: "If land is sold on which no taxes are due, the purchaser or his grantee may recover the amount of his bid . . . and 6 per cent. interest." Also to Chapman v. Brooklyn, 40 N. Y. 379, 380, where it was held that "it is equally unjust and inequitable for them (municipal corporations) to retain money they have acquired without consideration, as it is for a private person to do so." "It has been repeatedly held," in the Courts of different states of the Union, "that taxes illegally imposed and collected might be recovered back from the municipality." Money paid under a mistake of fact can be recovered as money had and received: Newsome v. Graham, 10 B. & C. 284. So also where the consideration has failed: e.g., money paid as deposit on a contract of sale which has been rescinded: Blackburn v. Smith, 2 Ex. 783; or which a vendor could not complete: Gorbell v. Archer, 2 A. & E. 500; Bullen & Leake, 3rd ed., p. 48. It seems to me that there would be no great difficulty in holding the plaintiff entitled to recover money paid at a tax sale under these circumstances were it not for sec. 166 of the Assessment Act: "When the title to any land sold for arrears of taxes is vested in the Crown, the deed or tax sale certificate

therefor, in whatever form given, shall be held to convey or include only such interest as the Crown may have given or parted with or may be willing to recognize." In South Norfolk v. Warren, 8 Man. L. R. 481, it was held that there might be taxable interests in lands not alienated by the Crown. In Whelan v. Ryan, 20 S. C. R., Gwynne, J., said (p. 73): "Upon a true construction of the British North America Act . . . lands in the province of Manitoba do not, in my opinion, become subject to municipal taxation until the issue of letters patent therefor." In Ruddell v. Georgeson, 9 Man. L. R. at p. 414, Mr. Justice Bain held, notwithstanding this decision of Gwynne, J., that "this Court is committed to the view that when once rights are given or interests in these lands have been parted with by the Crown, such rights and interests become property and rights subject to provincial laws, and may be made liable to municipal taxation." So far as appears by the evidence, there is nothing to shew that these lands had ever been under occupation. Assuming that the lands in question had been and were occupied by persons who, in course of time, and on performance of certain conditions, would be entitled to patents from the Crown, we must hold it established that those interests, whatever they were, were taxable. But what were those interests? Did they not consist at the most in mere licenses of occupation? What interest was there in reality that could be sold by the municipality? There could have been and was nothing that the Crown was bound to recognize. To say that a purchaser acquired or could acquire an interest under sec. 166 seems to me to be making an illusory statement. It is not known, so far as I am aware, that the Crown has ever recognized the rights of a tax purchaser, and there is no probability, in my judgment, that it will ever do so. The provisions of sec. 166 must be considered in connection with the constitutional restriction contained in sec. 125 of the British North America Act. While we are bound to hold that the interest of a locatee or homesteader of Dominion lands is taxable, and the taxes constitute a debt from the party assessed therefor to the municipality, we must, I think, also recognize that the provisions of sec. 166 are wholly ineffective so far as they attempt to confer upon a municipality power to convey title in lands vested in the Crown to a purchaser. The provincial legislature is absolutely incompetent to confer such power upon the municipality, and

the Parliament of Canada could do so only by statutory enactment, of which there is no sign. The consideration being, therefore, nugatory, there being nothing whatever that passes or can pass to the purchaser, it would seem to me that on this ground the municipality are bound by every consideration of equity to refund the money paid to them at the sale.

It was argued at the trial that the secretary-treasurer was a statutory officer, independent of the municipality, and performing duties imposed upon him by statute, and that therefore the municipality were relieved from any liability for his actions. Section 162 of the Act prescribes that the treasurer shall in the list of lands to be advertised distinguish them as patented and unpatented. But is not the treasurer, in so doing, acting as the agent of the municipality, even if his duties are set forth in the statute? Reference was made to Seymour v. Township of Maidstone, 24 A. R. 370, where the question was as to the responsibility of the township for the acts of an engineer under the Ditches and Watercourses Act. In Forsyth v. Canniff, 20 O. R. 478, the municipality were also held not liable, the officer in question being the medical health officer appointed under the Public Health Act. In Hesketh v. City of Toronto, 25 A. R. 449, on the other hand, the city corporation were held liable for injuries caused by the negligence of the servants employed in connection with a fire department which they were not bound to establish and maintain. The following appears to be a clear statement of the law on this point: "A municipal corporation is not responsible for the unlawful or negligent act of an officer appointed in obedience to an Act of the legislature to perform public services in which the corporation has no particular interest and from which it derives no special benefit or advantage in its corporate capacity:" per Bigelow, C.J., in Hafford v. New Bedford, 16 Gray 297, cited by Ritchie, C.J., in McSorley v. Mayor, etc., of City of St. John, 6 S. C. R. at p. 544.

But it is clear in the case of this secretary-treasurer that the municipality appoint him, can control him in the discharge of his duties, can continue or remove him, can hold him responsible for the proper performance of his duties, and that his duties relate to the municipality and are of benefit to the municipality. He is an officer of the government or of the Municipal Commissioner only when it is so expressly provided, as in sec. 187 and following sections.

Section 315 of ch. 11 of the statutes of 1884 was materially amended by sec. 136, ch. 53, 53 Vict., re-enacted as sec. 170 of ch. 101, R. S. M. 1892, and now sec. 181 of ch. 117, R. S. M. 1902. McLellan v. Assiniboia, 5 Man. L. R. 265, and similar cases, holding that the treasurer is an independent statutory official, are therefore no longer applicable. It appears to me that the position of the treasurer, as an agent of the municipality, is now clearly defined. The case of McSorley v. Mayor, etc., of City of St. John, 6 S. C. R. 531, is decisive on this point. See the judgment of Strong, J., pp. 558-561. The treasurer of the defendant was an officer appointed and paid by the municipality, and performed the acts in question in the discharge of duties imposed by law for the peculiar benefit of the corporation, and the money was received by him for their benefit. The municipality cannot, therefore, escape liability by an attempt to shift the responsibility upon their own officer.

It is argued that the concise wording of the advertisement constitutes, in connection with the other circumstances, a warranty on the part of the corporation that the lands in question were patented lands, and, after consideration, I am disposed to accept that view. A warranty may be found in statements made in advertisements if relied upon by the buyer: Parsons on Contracts, sec. 576, note; Morris v. Bradley Fertilizer Co., 64 Fed. R. 55. The decisive test whether language is used as a mere expression of opinion or a warranty is, whether it purported to state a fact upon which it may fairly be presumed that the seller expected the buyer to rely, and upon which the buyer would ordinarily rely: 30 Am. & Eng. Encyc. of Law, p. 142. Moreover, it is not always necessary that the buyer shew an intention on the part of the seller to warrant; if the latter makes a positive affirmation as to a material fact, and the former, relying upon the truth of it, makes a purchase which he, otherwise, probably would not have made, a warranty will be presumed, even in opposition to affirmative proof of the absence of an intention to warrant, upon the ground that the seller cannot be allowed to induce a purchaser by such conduct and escape the responsibility by averring the absence of an intention to warrant: ib., p. 140, and the cases there referred to. No particular words or form of words are needed to create a contract of warranty: Smith's Leading Cases, vol. 2, p. 56. "Any affirmation at

the time of a sale is a warranty, provided it appears on evidence to have been so intended:" Cave v. Coleman, 3 Man. & Ry. 2. It is a question of fact in each case, upon the construction of the words used and of the circumstances, whether such an intention is expressed: Leake on Contracts, p. 263. It seems to me a legitimate conclusion to be drawn from the evidence that the assertion in the advertisement that the particular lands in question were patented was intended as a statement of fact upon which intending purchasers could rely. That it has such effect upon the purchaser is clear, as Mr. Alloway stated on cross-examination that he would not have otherwise purchased. In De Lassalle v. Guildford, [1901] 2 K. B. 215, A. L. Smith, Master of the Rolls, says: "To create a warranty, no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it . . . In determining whether it was so intended (as a warranty), a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter it is not. . . . That the above constitutes a warranty upon the sale of a chattel cannot be doubted, and why not upon the sale of real property?" In this case now before me, I paraphrase the paraphrase (by the Master of the Rolls) of the evidence in De Lassalle v. Guildford at p. 221: "You need not examine the records in the department at Ottawa or in the office of the district registrar; it is quite unnecessary. There is a patent, and it issued before the taxes accrued for default in the payment of which the lands are to be sold. The municipality give you an assurance upon the subject upon which you can rely. Will that satisfy you? If so hand over your money." Is this not, on the evidence, the basis of the contractual relation between the parties? It seems so, because we have Mr. Alloway's statement that, without the assurance contained in the advertisement that the lands were patented, there would have been by him no offer to purchase at all.

In Pearson v. Dublin, [1907] A. C. 351, it was held that a municipal corporation are liable for misrepresentations as to a matter of fact made on behalf of the corporation by their engineers whereby the plaintiffs were induced to enter into a contract. The principal and the agent cannot so divide the responsibility that the principal can escape: Lord Halsbury, at p. 357. The provision of sec. 162 of the Asessment Act, requiring the lands to be distinguished as patented or unpatented, has an object in view, and that is to afford information to intending purchasers so that they may regulate their bidding or refrain altogether therefrom, as might seem prudent. The provision is obviously important and intended for the protection of the purchaser. The municipality cannot avoid, but must accept, full responsibility for the acts of the treasurer in this respect.

I have not lost sight of the contention presented by defendants' counsel that "the rule of caveat emptor applies to prevent a tax purchaser from recovering his purchase money," as stated in Blackwell, p. 1006. "At common law, the purchaser at a tax sale comes strictly and rigidly within the rule of caveat emptor. The proceedings are of record, and he is chargeable with notice of every defect and irregularity appearing in them. Besides, the power of the officer to sell is a naked power, statutory, and not coupled with an interest. The bidder, therefore, cannot be considered a bona fide purchaser, in the customary sense of the term. And if his tax title prove to be worthless, he cannot recover the amount he has paid in an action for damages against the officer, the owner, or the municipality." Such is the law prevailing under various enactments, relating to municipal taxation, through the United States, except where several States have by statue provided that the purchaser may recover, and in the light of which Chapman v. Brooklyn must be read: Black on Tax Titles, p. 463. Such was also the decision in Austin v. County of Simcoe to which I have referred. But in that case McLean, C.J. (p. 75) held that the sheriff who made the sale and advertised the lands as an independent statutory officer might perhaps be held personally responsible, had he given an assurance that the title to the lands in question was good. But the sheriff in that case was held to be selling the "interest" only for the owner as at a sale of goods under execution, and it appears that a conveyance of the lands may have been executed. None of the decisions in the

United States, so far as I can ascertain, deals with the case where the lands of the United States, constitutionally exempt from taxation, have been sold for taxes as patented lands by a local authority, and a claim has been made for recovery of the purchase money. But the doctrine of caveat emptor does not apply where the vendor takes upon himself to inform the purchaser, and the purchaser agrees to trust to him with regard to particulars which he could ascertain himself by inspection: Kerr on Frauds, p. 69. An action will lie against the seller of any interest in an estate for affirming the rents to be more than they are, while he is in treaty about the sale, if the party to whom the affirmation is made relies upon it, and buys the interest thereon: Lysney v. Selby, 2 Ld. Raym. 1118. Under the circumstances of this case now before me, I have come to the conclusion, not without some hesitation, that the action of the defendant municipality through the treasurer in listing the lands in question as patented, when in fact no patent had been issued therefor, was such a misrepresentation as excludes the operation of the rule of caveat emptor.

By the weight of authority, where a positive representation is made by a vendor as to the title, with a view that it shall be relied upon, ordinary diligence does not require that the other party shall examine the records to test the truth of the representation, if no fact or circumstance is disclosed which is calculated to suggest a doubt as to the truth of the representation and thus to put him on inquiry: Barr v. Doan, 45 U. C. R. 491; 14 Am. & Eng. Encyc. of Law, p. 132; and cases there referred to. It is here for this Court, sitting as a jury, to decide whether the words of the advertisement are to be interpreted merely as an expression of opinion or as a statement of fact: Smith v. Chadwick, 9 App. Cas. 187; 14 Am. & Eng. Encyc. of Law, p. 206. I hold that the statement in question was a positive statement of fact made with the intention that it should be relied upon.

It was contended by defendants' counsel that sec. 229 of the Assessment Act constitutes a bar to the plaintiff's claim for the taxes subsequently paid by him. But I hold that there has been established on the evidence a contract of warranty on the part of the defendant, in consequence of which these payments were made, and for breach of which contract the plaintiff is entitled to damages. As damages resulting from the breach I fix the amount so paid as subse-

quent taxes, together with the amount paid at the sale, with interest on those amounts from the date of their respective payments at 5 per centum per annum. I see no principle on which I can allow compound interest or the amount claimed for costs. The plaintiff is entitled to the costs of this action.

MANITOBA.

JULY 6TH, 1908.

COURT OF APPEAL.

ANCHOR ELEVATOR CO. v. HENEY.

Service out of Jurisdiction—Statement of Claim—Rule 201 (e)—"Action Founded on any Tort Committed within Manitoba"—Preference—Chattel Mortgage—Assignments Act—Statute of Elizabeth.

The statement of claim shewed that the plaintiffs recovered a judgment against the debtors on 12th November, 1907, for $408.60; that on 15th November the debtors executed a chattel mortgage on "all and singular the goods and chattels, stock in trade and effects, of them, the said debtors, to the defendants as security for the payment of an alleged antecedent indebtedness of the said debtors to the defendants. The said goods and chattels, stock in trade and effects, were exigible for execution." Then followed such allegations as would be sufficient to make the chattel mortgage a preference within the Assignments Act, and thus, in the language of the statute, utterly void.

The defendants were apparently a joint stock company, and had their head office and place of business in Montreal, and that was also their place of business when the chattel mortgage was made.

The statement of claim was served in Montreal, and a motion was made on behalf of the defendants to set aside the service. As a result of that motion an order was made by the Referee in Chambers requiring the plaintiffs to prove at the trial of the action a tort committed within the province of Manitoba, within the provisions of Rule 201 (e) of the King's Bench Act, R. S. M. 1902 ch. 40, or a transfer or conveyance by way of chattel mortgage made

within said province fraudulent at common law, or under any statute, and in default of proving such facts that there should be a nonsuit, and allowing the service to stand. Against the order an appeal was taken before MACDONALD, J., who dismissed the appeal with costs, and from that decision the defendants appealed to the Court of Appeal.

J. B. Coyne, for defendants.

R. W. McClure, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

HOWELL, C.J.A.:—The power of the Court to act where a defendant is out of the jurisdiction was recently discussed in this Court in the case of Emperor of Russia v. Proskouriakoff, ante 461, and the principles there discussed by me in that case need not be here repeated. It is sufficient, I think, to state that the onus is upon the plaintiff to shew that this Court has jurisdiction.

The order was made and is sought to be supported under Rule 201 (e), which provides for service out of the jurisdiction whenever "the action is founded on any tort committed within Manitoba." As an authority in support of the order the case of Clarkson v. Dupré, 16 P. R. 521, was cited and relied upon, and it was apparently upon the authority of this case that the learned Referee made the order, because the form of it is practically that made in that case. That case was an action begun against the defendant wherein it was alleged in the pleading and proved by affidavit that an actual transfer of chattels had taken place in Ontario whereby creditors were defrauded, and the defendant had, after actually receiving the chattels, sold a portion of them and transferred the remainder of them out of the jurisdiction of the Court, and the remedy asked was that the defendant account for the proceeds of those sold and re-deliver those not sold so that they could be exigible in execution. The order made in that case was that at the trial the defendant must prove that there was a transfer within the province, that is, an actual transfer of the corpus.

In this case it is alleged simply that there was a paper title to the goods delivered to the defendants, but no pretence that the defendants had ever in any way got the possession of the goods and no pretence that there was any physical difficulty in the plaintiffs seizing the goods covered

by the chattel mortgage. The prayer is that the Court should declare that this paper title to the goods is utterly void as against the plaintiffs.

Under the Statute of Elizabeth a creditor was always permitted to prefer, and it surely could never have been ground for a common law action for a debtor to simply prefer one creditor at the expense of others. The defendants had a perfect right to take this chattel mortgage, and their title to the goods is absolute against the whole world, save only the plaintiffs' claim to have the goods applied towards satisfying their claims. If the defendants chose, they would have a perfect right to stand in the position of the debtor and pay the plaintiffs' claims and hold the goods for themselves, and perhaps that is the position they wish now to take. They are the owners of the goods, subject only to the plaintiffs' claim to be paid the debts due them from the debtor. Can it be that merely taking a paper title to goods under those circumstances is a tort? Unless the plaintiffs can make out their case within the statute, the order must be set aside.

Addison in his definition of torts says: "To constitute a tort two things must concur—a wrongful act committed by the defendant and damage to the plaintiff."

Salmond on Torts lays down the law thus: "No civil injury can be classed as a tort unless the appropriate remedy for it is an action for damages . . In an action for a private nuisance an injunction may be obtained in addition to damages. . . But in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort."

It seems to me that the plaintiffs had a perfect right to say: "We will take a chattel mortgage on those goods, but we know that as against the creditors of the debtor this mortgage will be utterly void." They knew the effect of the document they were taking, and took it, and, it seems to me, lawfully took it. They took it knowing that as against creditors they had no title, but they had a title against the whole world, including the debtor, except only the creditors. They have not in any way interfered with the right to seize these goods. I cannot think there is an action of tort.

It might be that an action to declare rights and titles under certain circumstances might be entertained in this

Court, but such an action, it seems to me, cannot be classed as an action founded on tort.

The appeal should be allowed and the order of the Referee reversed and an order made setting aside the service.

The defendants to have the costs of this appeal, the appeal before Mr. Justice Macdonald, and the motion before the Referee, in any event of the cause.

Appeal allowed.

MANITOBA.

JULY 6TH, 1908.

COURT OF APPEAL.

CANADIAN RAILWAY ACCIDENT INSURANCE CO. v. KELLY.

Evidence—Foreign Commission—Examination abroad of Officers of Plaintiff Company—Production of Books of Company before Commissioner — Convenience—Case made on Affidavits.

The plaintiffs were an insurance company and had their head office and books at Ottawa, and the defendant was their local agent, canvassing for insurance in Manitoba, with his place of business at Winnipeg, and was in the employ of the company for a considerable period of time, which employment ended in October, 1905.

This action was instituted to compel the defendant to account for certain moneys received by him and to charge him with the premiums on certain policies of insurance, or, perhaps more correctly, to refuse credit to him for certain commissions, and the defendant in the same action had a counterclaim.

During the progress of the action discovery and production were demanded by the defendant in due course, and the plaintiffs discovered all papers and documents, but they were relieved from the production of certain books which they contended must necessarily remain in their head office, because of the requirements of their business, the defendant, however, being permitted to examine these books and to take copies.

Subsequently the defendant was examined in the suit at great length. The plaintiffs applied for a commission to take evidence in Ottawa, and the evidence they proposed was the examination of the officers and employees of the company at Ottawa, the names of whom other than John Emo, the general manager, were not given, and the production and examination of the books there with witnesses to explain entries therein.

The application was made before the Referee, supported solely by the affidavit of Mr. Fullerton, one of the plaintiffs' solicitors. Briefly, his affidavit set forth that he was desirous of obtaining a commission to examine John Emo, the general manager, and other officers of the company. Further that it would be absolutely necessary for the plaintiff company to give evidence of the amounts received by the company for premiums on policies written by the defendant for the plaintiffs, "and the amount due by the said defendant to the plaintiff company for premiums unaccounted for by said defendant to said plaintiff company, to give evidence of advances made by them to the defendant for travelling expenses; and further that the proposed witnesses are necessary and material and that there are other witnesses they desire to call whose names are unknown."

Paragraph 11 of that affidavit was as follows: "That I am informed and verily believe that it would be utterly impossible from a business point of view for the officers of the plaintiff company who will be called to give evidence in this case, to leave their duties at the same time, and I say that it would be a saving of expense and convenience both to have the evidence of the said witnesses taken at Ottawa, in the said province of Ontario, and I believe the said examination abroad will be effectual."

The Referee granted the commission requested, which virtually meant that Emo and the other officers of the plaintiff company would be examined as witnesses in Ottawa, where the books were, and that the books would only be produced there and would not be before the trial Judge at Winnipeg—practically changing the venue to Ottawa. The defendant appealed to DUBUC, C.J.M., who affirmed the order of the Referee; and the defendant further appealed to the Court of Appeal.

J. E. O'Connor and H. P. Blackwood, for defendant.

J. P. Foley, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), was delivered by

HOWELL, C.J.A.:—On the opening of the case the plaintiffs' counsel realized that the affidavit before the Referee was probably insufficient, and asked to read first, as or right, further material. This right was of course not conceded, but he finally obtained the leave of the Court to put in further material, and he put in his offin affidavit, which was sworn to on 19th June, and an affidavit of Mr. Pearson, the secretary-treasurer of the plaintiff company, sworn to on 2nd November, 1907, and the depositions of the defendant.

Mr. Foley's affidavit states that the books of the company which have not been produced are necessary on the plaintiffs' behalf to establish their own claim and also to meet the defendant's counterclaim. The affidavit further states that one Dixon was once the secretary of the plaintiff company, that he resides in Ottawa, that he is not now an officer of the company, and that his evidence is very material not only on the part of the plaintiffs' claim, but also as to the defendant's counterclaim, and I assume therefore that he was an officer of the company while the defendant was their agent here. The affidavit does not state that Mr. Dixon will not attend here for the purpose of giving evidence, nor that there is any difficulty in getting him to come here. The affidavit further states that a Mr. Kenning, who is now in the plaintiffs' employ at Winnipeg, informed him, the deponent, that the books were in daily use at Ottawa in the head office of the company, without stating what particular books they were.

The affidavit of Pearson, the present secretary-treasurer of the company, states that the books, being cash book, journal, agency ledger, and policy register, are books in daily use at the office, and that it would be inconvenient and next to impossible to carry on their business without these books being there and in the plaintiffs' office, "as it is necessary to refer to them every day in the course of the plaintiffs' business." It appears amongst the papers that some of these books at all events have been in the office for 5 years. This affidavit was sworn to in November. I cannot think that these books will be forever necessary in the plaintiffs' office, and I should want greater detail of why they must all be used every day before I could believe that some of them at least, as well as the applications for in-

surance, could not be sent here. I think the order for commission should not have been granted on the material before the Referee.

A great number of cases on the subject were cited before us, and authority could be found in random expressions of Judges to support both sides of this case.

In Robins v. Empire Printing and Publishing Co., 14 P. R. 488, Meredith, J., in 1892, held that in a libel suit where the plaintiff resided in England and commenced his suit in libel in Toronto against the publishers of a newspaper there, his evidence should be taken on commission together with the evidence of other witnesses on an affidavit sworn to by himself, thereby reversing the order of the Referee in Chambers. The exact converse of that was held in the following year in England in the case of Keeley v. Wateley, 9 Times L. R. 571, where an order for a commission was set aside. In that case a Chicago doctor was not allowed a commission to take his evidence in Chicago to be used in a libel suit against the Lancet in London. A couple of other cases are reported where a commission has been issued to examine a plaintiff, but in both cases they are upon terms that the plaintiff shall, if required by the defendant, appear and be cross-examined at the trial.

It does strike me as strange that where a plaintiff is compelled to sue, or chooses to sue, in a foreign foram, he should ordinarily be excused from appearing there and giving his evidence.

Since the decision of the various cases that were cited in the argument, I find the question came up for discussion in Ross v. Woodford, [1894] 1 Ch. 42, where most of the previous cases were reviewed. In that case the following language is used: "No doubt it is a matter of great importance to see the demeanour of witnesses in open court. There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself; so too with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out." This language commends itself to me as the rational law on the subject. The chief witnesses, and, so far as we can gather from the affidavits, practically the only witnesses,

whom the plaintiffs wish to examine, are the plaintiff's officers and an ex-officer; and the books of the plaintiff company they desire to put in evidence. It seems to me I should treat this evidence in the same way as I would the personal evidence of an individual plaintiff.

I have read the examination of the defendant taken at great length, and it seems to me that counsel to cross-examine those witnesses as to those books and as to the applications for insurance made here by the defendant, and as to the reasons for the defendant not having received or accounted for premiums, would require constantly the defendant at his elbow, and that it would be impossible to instruct counsel on this subject. If I am right in this, then this is a case where the plaintiffs would, if the commission issues, compel the defendant to go to Ottawa to be present at a greater part of the trial there.

It would not cause great delay for some of the officers to come from Ottawa here to be at the trial, with the direct railway communication that now exists. It is not a question of crossing oceans and of great delay and expense.

I do not believe that all these books must be kept at the head office of the company all the time. I think fuller and more complete descriptions of what the books are and actual dates and frequency of entries in them must be given before it is apparent that it would be very injurious to take the books from Ottawa here for the few days that they would necessarily be absent for the trial; knowing as I do that the Judges fix dates for trials of this kind, and there is no delay, and knowing that the practice commonly is that books of that nature are produced before the courts and then copies of the entries are left behind and the originals are allowed to be taken away at once, I cannot think either that all the officers of this company must stay in Ottawa all the time. At all events stricter proof of the necessity of it must be given than what is before the Court.

It seems to me that a proper case might be made out for the examination of some of the officers of the company on some of the facts which the plaintiff wished to prove in Ottawa, and that the books, or at all events all those that are not absolutely required all the time, might be brought here with the other officers to verify them, so that the Court here might see those original books and form some opinion of their value as evidence, rather than copies of portions of them certified to at Ottawa.

I quite agree that a case might be made out where a plaintiff could be examined on commission, but I think the proof should be of the clearest kind and should depend upon evidence not of information and belief, but of the best nature that could be got, and it seems to me the practice should be decidedly the exception and should only be resorted to when the inconvenience or expense would otherwise pretty nearly thwart the ends of justice.

The appeals must be allowed with costs to the defendants in any event of the cause, of the appeal to this Court, the appeal to the Chief Justice of Manitoba, and of the motion before the Referee.

MANITOBA.

JULY 6TH, 1908.

COURT OF APPEAL.

HAFFNER v. CORDINGLEY.

Principal and Agent—Agent's Commission on Sale of Land—Contract to Pay Commission—Construction—"Completion of the said Sale"—Execution of Binding Agreement—Sale not Carried out.

Appeal by defendants from judgment of MATHERS, J., 7 W. L. R. 764.

Action by plaintiffs, real estate agents, for commission on sale of property.

The amount claimed by the plaintiffs as payable was $5,000. The defendants denied that the plaintiffs were entitled to anything, but finally a compromise was arrived at by which the amount to be paid was fixed at $2,000. The following document was then drawn up and signed:

"Winnipeg, Man., 11th February, 1907.

'John Haffner & Son,

"Gentlemen:—In connection with the sale of parish lots 57, 58, and 59 of the parish of St. Boniface outer two miles, from Mrs. Cordingley and myself to John A. Lock et al., I hereby agree that on the completion of said sale I will pay your firm a commission of $2,000. This amount to be paid whether I retain an interest in the said land myself,

or not. This amount to be paid on completion of the deal. I am acting in this matter for Mrs. Cordingley and myself. Yours truly,

"C. H. Cordingley."

When this document was signed, the purchaser had made a deposit of $2,000, but no agreement had been executed, nor had the terms of the purchase been settled beyond the provision that $35,000 was to be paid in cash when the agreement was executed, and the balance in 3 annual payments. A few days afterwards the formal agreement to purchase was executed by all parties, containing the usual covenant for payment. By it the payment to be made upon execution of the agreement was fixed at $10,000, and a further sum of $25,000 was to be paid on 1st March following, without interest.

The cash payment of $10,000 was made at the time of the execution of the agreement, but the purchaser defaulted in the payment of the $25,000 on 1st March. On that day he paid, however, $5,000, and obtained an extension of time to 1st July for the balance. Subsequently a further sum of $500 was paid, but nothing more, and on 10th October the defendants took back the land and released the purchaser from all obligation under the agreement. The contention of the plaintiffs was that their commission became payable on the execution of agreement of sale. The defendants, on the other hand, contended that it was not to become payable until the sale was carried out, and, as the sale had not been and never could be carried out, without any default on their part, the plaintiffs had no claim.

The case was tried before MATHERS, J., who gave judgment for plaintiffs for $2,000 and interest.

Defendants appealed.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

A. J. Andrews and M. G. Macneill, for defendants.

J. H. Munson, K.C., and E. F. Haffner, for plaintiffs.

PHIPPEN, J.A.:—The expressions "completion of the sale" and "completion of the deal" in the commission agreement (exhibit 1) are ambiguous in that they refer to a particular deal the terms of which are not stated, but

which must be ascertained in order to determine if the time of payment has arrived.

Shortly prior to 11th February, 1907, the defendants gave a verbal option on property which they had previously intrusted to the plaintiffs for sale. The intending purchaser, to secure the option, paid $2,000, to be applied on account of the purchase money should the purchase be completed. The plaintiffs on learning of the option contended that on completion of the sale they would be entitled to commission at 5 per cent. on the purchase money, amounting approximately to $5,000. This the defendants disputed, and after some negotiation the agreement embodied in exhibit 1 was arrived at.

On or about 14th February the defendants entered into a written agreement with the nominee of the option holder whereby the defendants agreed to sell and Albert S. Lock agreed to purchase the land referred to in exhibit 1, for the sum of $101,000; payable, $10,000 cash; $25,000 on 1st March following; and the balance in 3 equal annual payments. The cash payment was made by appropriating the $2,000 option payment and by the further payment of $8,000, paid by cheque dated 14th February, and, according to the evidence, handed to the defendants immediately before the preparation and execution of the formal agreement.

The purchaser defaulted in the payment of $25,000 which matured on 1st March. Thereupon the defendants granted an extension of time, accepting a payment of $5,000 on account, and at a later date gave a further extension, on receipt of an additional payment of $500. The purchaser was unable to carry out his contract, which finally was cancelled by forfeiture of the payments and a surrender of the purchaser's interest under the agreement, the defendants releasing the purchaser from further liability on his covenant.

The plaintiffs contend that the execution and delivery of the contract is a completion of the sale or deal within the meaning of exhibit 1, and that they are therefore entitled to payment of the agreed amount. The defendants contend that the sale or deal which was in contemplation when the agreement sued upon was made was one the cash consideration of which was to be $35,000, and that the sale which they say was forced upon them, being made

against a payment of $10,000 only, and the purchaser having defaulted, they are not liable for the $2,000 claimed.

What sale or deal was in the minds of the contracting parties at the time of the execution of exhibit 1 is entirely a question of fact. The learned trial Judge, who had the advantage of hearing at first hand the somewhat voluminous evidence, finds that "what the parties meant by the words 'completion of the sale' and 'completion of the deal' in the above quoted document was the execution of a binding agreement of sale." If this finding of fact is correct, the appeal must be dismissed.

Besides having the advantage of a full argument of this appeal, I have gone somewhat carefully through the trial evidence, and am satisfied that there is ample justification for the learned trial Judge's finding.

A final agreement of sale having been entered into, which, so far as one can judge from the reading of exhibit 1, complies with its terms, the onus was upon the defendants to shew that this was not the agreement in the contemplation of the parties when exhibit 1 was executed. The evidence of the defendant Cordingley, who acted throughout for his co-defendant as well as himself, is not at all satisfactory on this point. He does not state that the sale which he originally contemplated was based on a $35,000 cash payment. He asserts that the present agreement was made because the absence from the city of one of the intending purchasers interfered with their financial arrangements. He does not, however, attempt to state with any clearness when the transition took place. The cash payment having been completed within 3 days after the execution of exhibit 1, it may well be that when exhibit 1 was signed the sale contemplated was on the terms finally agreed to.

Again, both of the plaintiffs stated positively that, on several occasions after the sale agreement had been executed, the defendant Cordingley recognized his responsibility for the commission by asking for time for payment and by producing certain documents shewing his ability to meet his obligations if leniently treated by the plaintiffs. If the learned trial Judge believed this testimony, it strongly recognized the plaintiffs' contention that all things had happened upon which the payment of the commission was conditioned.

In the view I take of the evidence, I do not think this Court should interfere with the learned trial Judge's findings.

I would dismiss the appeal with costs.

HOWELL, C.J.A.:—I have seen the judgment of my brother Phippen and I agree with it.

The commission by the special agreement was to be paid on "the completion of the sale" or "on completion of the deal" then pending or in contemplation with "John A. Lock et al." Parol evidence was admitted, and I think properly so, to shew the proposed terms of the sale and what was intended by the parties in using the terms above quoted.

That evidence, in the light of the facts existing when the special agreement for commission was made, supports the findings of the learned trial Judge.

I think the sale was completed within the meaning of the contract of 11th February by the execution of the contract of sale by the defendants and Lock.

The appeal must be dismissed with costs.

RICHARDS and PERDUE, JJ.A., concurred.

MANITOBA.

JULY 6TH, 1908.

COURT OF APPEAL.

TRADERS BANK v. WRIGHT.

Costs—Quantum of—Statute Limiting—Construction—Interlocutory Application and Appeal—"Action or Proceeding."

By the judgment of this Court pronounced on 12th May, 1908, 8 W. L. R. 208, the injunction granted by MACDONALD, J., ante 105, until the trial of the action, was dissolved, and the plaintiffs were ordered to pay defendants' costs of the motion in the Court below and of the appeal forthwith. No provision was made for any special increase of costs.

The defendants' bills of these costs when taxed under the tariff amounted, exclusive of disbursements, to considerably more than $300. The question then arose, to what costs were the defendants entitled under 8 Edw. VII, ch. 12, secs. 1 and 2?

W. R. Mulock, K.C., for defendants.

G. D. Minty, for plaintiffs.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—Mr. Mulock, for defendants, contended that sec. 2 of the Act 8 Edw. VII. ch. 12 did not cover the present case, that the granting of an injunction was not a mere interlocutory motion such as is contemplated by sec. 1, and that the Act did not apply to it. He contended that the defendants were therefore entitled to tax a full bill of the costs in the Court of Appeal as if the Act had not been passed.

Section 1 of the above Act declares that "notwithstanding anything in the King's Bench Act or Rules . . or in the tariff of fees in force thereunder, the amount of costs, exclusive of disbursements, but including all interlocutory motions and applications and any appeal or appeals therefrom to the Court of Appeal, which may be taxed and allowed to the successful party in any action or proceeding of any nature or kind whatsoever as against any other party thereto up to and inclusive of the trial or final disposition of any such action or proceeding in the said Court of King's Bench, shall . . be limited to the sum of $300."

Section 2 of the same Act provides that "no greater sum than $100, exclusive of disbursements, shall be taxed and allowed for costs of appeal from the final disposition of an action or proceeding in the Court of King's Bench, to the successful party in any appeal to the Court of Appeal, as against the other party thereto."

The Act empowers the trial Judge to increase the allowance for costs in cases of special importance or difficulty, and the Court of Appeal may also in its discretion order the allowance of a greater amount than the sum fixed for costs in that Court, if the case is one of special importance or difficulty.

The meaning of sec. 1 clearly is that the total costs of an ordinary action, down to and including the trial,

recoverable against the unsuccessful party, shall be limited to the sum of $300 and disbursements. The costs of all interlocutory motions and applications and of appeals therefrom to the Court of Appeal are included in this limited allowance of $300 and disbursements. The same rule is to apply in the case of a proceeding of an independent character not being an action. Such a proceeding must be one in the nature of an action, "a proceeding in which a lis is initiated:" Hoods Barrs v. Cathcart, [1894] 3 Ch. 376. It does not mean a motion or step in a cause which has already been commenced. An application for a prohibition or to set aside an award under the former practice by leave under Rule 774, might be given as examples of what is meant by the word "proceeding" in sec. 1.

The costs in question were incurred on a motion for an injunction until the trial of the action and on an appeal from the order granting it. "Injunctions are either interlocutory or perpetual. Interlocutory injunctions are such as are to continue until the hearing of the cause. Perpetual injunctions are such as form part of the decree made upon the hearing upon the merits:" Kerr on Injunctions, 4th ed., p. 1. See also King's Bench Act, sec. 39 (o); Rule 893. The motion for injunction in this suit was therefore an interlocutory motion, and the costs of that motion and of the appeal from it come under the provisions of sec. 1 of 8 Edw. VII. ch. 12, unless sec. 2 can be applied so as to make the costs of the appeal additional to the $300 and disbursements allowed by sec. 1.

I think the words "action or proceeding" in sec. 2 have exactly the same meaning as they have in sec. 1; that is to say, they mean an action or something in the nature of an action. "Proceeding" in sec. 2, as in sec. 1, does not include a step in a cause or an interlocutory motion. The words "final disposition of an action or proceeding in the Court of King's Bench," shew that the appeal that is referred to in this section is one from a judgment in the Court of King's Bench, which deals finally with the action or subject of litigation. It cannot therefore include an appeal from the order made upon an interlocutory motion or application. The costs of such appeal must be included in the $300 mentioned in sec. 1.

The costs of the defendants in the Court of King's Bench and in the Court of Appeal, collectively, must therefore be limited to the sum of $300 and disbursements.

MANITOBA.

MATHERS, J. JULY 7TH, 1908.

TRIAL.

NICHOLSON v. PETERSON.

Fraud and Misrepresentation—Sale of Land—Action to Set aside—Untrue Representations of Purchaser—Immateriality — Damage not Directly Resulting — Dismissal of Action — Costs—Depriving Successful Parties of.

Action to set aside a sale and transfer of land under the Real Property Act, from the plaintiff to the defendant Roger and by him to the defendants Peterson Bros., on the ground of fraud.

A. J. Andrews and H. A. Burbidge, for plaintiff.

I. Pitblado, for defendants the Petersons.

E. Anderson, for defendant Roger.

MATHERS, J.:—The plaintiff was the owner of 237 feet of land extending from the bank of the Red river along the North side of Alfred street, east of Main street, in the city of Winnipeg. That street was paved with asphalt, had granolithic sidewalks, gas, water, and sewer, and there were no manufacturing establishments upon this part of the street. It was pretty well occupied with small dwelling-houses and cottages, but there were still some vacant spaces. About 1902 the defendants acquired land on Aberdeen street extending from the Red river for 280 feet along the south side of the street, and abutting on the plaintiff's land, and erected a metal and brass foundry and repair shop upon it, which they have operated ever since.

Aberdeen street is not paved, and the defendants desired to secure an outlet to Alfred street, and, for that purpose, to secure the whole or at least a part of the plaintiff's land. The defendant Roger was a friend of the

Petersons, and he knew, from conversations with them, their desire to secure this outlet. Until the spring of 1906 the plaintiff did not want to sell the whole or any portion of his property, as he wished to build dwelling-houses upon it. On two different occasions he had refused to sell to Peterson Bros., but I think his reason for so refusing was that he wanted to hold the property, and not because of any objection to selling to Peterson Bros., their offer being to buy all his land. About March or April of 1906, however, the plaintiff decided to build a double house on the portion of the land immediately abutting the foundry, and he at the same time decided to sell a part of the land west of the proposed building in order to raise money for that purpose.

William Peterson, having heard of the plaintiff's desire to sell, informed Roger that Nicholson was willing to sell the whole or part of his land. With this information, Roger then approached Nicholson and opened negotiations for the purchase of part of the land. I think in the first instance he did so on his own account, and without any instructions from the Petersons. He knew that if he succeeded in buying, he could at once resell to the Petersons, possibly at an advance, but he never had any other object in buying than for the purposes of a resale to the Petersons.

Roger had, in all, 3 interviews with the plaintiff before an agreement was arrived at and a memorandum of agreement signed. At the first interview he ascertained that the plaintiff was willing to sell 50 feet of his land for $1,500 cash. Roger communicated this information to James Peterson, and received instructions to buy it in his own name for Peterson Bros. Roger afterwards had two interviews with the plaintiff, at the last of which an agreement for sale of 50 feet of land and a right of way over a 10 foot lane adjoining, for $1,500 cash, was arrived at. Roger, at this interview, paid the plaintiff $50, which he had received from James Peterson, as a deposit, and procured his signature to a memorandum of agreement which had previously been prepared by the same person.

The transaction was carried out by the solicitors of the plaintiff and of Peterson Bros. on 4th June. On that day the plaintiff executed a transfer to the defendant Roger, and received the balance of the purchase money. On the same day Roger executed a transfer to the defendants Peterson Bros.

I find that the plaintiff would not have sold the land in question to the Petersons because of the probability of their using it in connection with their foundry. I find that both the Petersons and Roger knew that the plaintiff would not so sell. I find that Roger represented to the plaintiff that he was buying the land for himself for the purpose of building a dwelling-house or houses upon it, and that he was not buying it for the Petersons, and that he would prefer that the foundry was not there.

I find that from the first Roger's object in buying was to resell to Peterson Bros., and that he never intended to build a double or any other kind of a house upon the land. I find that at the time of the first interview with the plaintiff, Roger was not in the employ of the Petersons, but I find that he repeated the representations after he was employed by them.

I find that the Petersons understood that Roger was to attempt to buy the land in his own name, and conceal from the plaintiff the fact that he was buying for them, and that they sanctioned his so doing. I find that the plaintiff was induced to sell to Roger by Roger's representation that he was going to build. I find that the plaintiff, during the negotiations, proposed restricting Roger from reselling to the Petersons or from permitting them the use of the lane, but that Roger refused to buy subject to any restrictions. I find that the plaintiff believed that Roger was buying the land for the purpose of building upon it, and that he was not buying for Peterson Bros., and that he was induced to so believe by false representations to that effect made by Roger. It is said that the statement made by Roger was a mere expression of intention. The condition of his mind was a fact, and a misrepresentation as to the condition of his mind was therefore a misstatement of fact: Edgington v. Fitzmaurice, 29 Ch. D. 459.

I find, however, that the plaintiff sold without restrictions of any kind, and knowing that Roger was at liberty to deal with the property as he saw fit.

It is not sufficient that the contract was induced by a false representation. It must have been as to a material fact, and damage must have resulted as the immediate and direct, and not as a remote, consequence of such representation: Bell v. Macklin, 15 S. C. R. 576.

Was the representation here material, and did injury result to the plaintiff as the immediate consequence of it?

Could the same result have followed if the statements made by Roger had been absolutely true? The plaintiff was willing to sell to any person, other than the Petersons, who was willing to pay his price. He was wiling to do so without restrictions of any kind. The plaintiff suspected that Roger might be an emissary of the Petersons, and he therefore proposed to impose conditions against a resale to them. I think Roger was telling the truth when he says the plaintiff did propose to so restrict him, and that he refused to buy if any restrictions were imposed. It is quite clear that, if the statements made by Roger had been true, he would have been perfectly free to change his mind immediately after the sale and resell to the Petersons. I agree with Mr. Pitblado that the plaintiff's right cannot be higher than it would have been had Roger's statements been true. I cannot find, therefore, that the representations were material or that damage has resulted as the immediate and direct cause.

The plaintiff's action, in my opinion, fails and must be dismissed.

As to costs it appears that Roger's defence was assumed by Peterson Bros., and that he has incurred no costs for his defence. I refuse him costs both on that ground and on the ground of the false representation which he made to induce the contract. During his examination for discovery James Peterson swore that they had paid Roger nothing for his services, whereas as a fact he had paid him by cheque $100. I am not satisfied with his explanation that he had forgotten the circumstance. I think the statement he made was deliberately untrue. For this reason I deprive the Petersons of the costs to which they might otherwise be entitled.

MANITOBA.

MACDONALD, J. JULY 13TH, 1908.

TRIAL.

BLOOMSTEIN v. J. D. McARTHUR CO.

Bill of Sale—Invalidity — Security—Mala Fides—Contract —Construction—Sale of Goods—Property not Passing—Scope of Contract—Priorities.

Action to recover possession of machinery, horses, and railway plant.

F. Heap and R. D. Stratton, for plaintiff.

C. P. Wilson and J. F. Fisher, for defendants.

MACDONALD, J.:—On 31st August, 1906, B. P. Kert and J. Rosenstein entered into a contract with J. D. McArthur, who subsequently assigned his interests to the defendant company, for the execution of part of the works on the construction of the road-bed of the National Transcontinental Railway. Rosenstein subsequently assigned all his interest in the contract to Kert, who entered upon and completed the work in accordance with the contract.

The defendant company advanced Kert groceries, provisions, and other supplies required by him in the execution of his contract, and he became largely indebted to them, and on 22nd September, 1906, an agreement (exhibit 4) was entered into, by the terms of which the sub-contractor was to have possession of such goods and chattels as the defendant company might supply during the will of the said company, and reserving the property in such chattels in the said company until fully paid for. There is no reference in this agreement to the goods and chattels brought upon the works, the property of Kert, being the chattels which are the subject matter of this action.

After the completion of the contract by Kert, and after final estimates were made for the work performed by him under his contract, it was found that he was largely indebted to the defendant company. The company took possession of the horses, plant, and other materials, and had a valuation made, and gave Kert credit for the value so placed upon his plant on his indebtedness to them. They claim this right under the terms of their contract with Kert (exhibit 2), which contract may hereafter be described as the sub-contract.

This sub-contract recites the contract into which the defendant company entered with the Commissioners of the Transcontinental Railway Company, which contract is described as the principal contract, and under the terms of the sub-contract the contractor therein is bound to carry out and perform all the obligations of the employer contained in the principal contract, so far as the same relate to the works covered by the sub-contract; and all the powers conferred by the principal contract upon the Commissioners and all the powers therein are conferred upon the defendant company by the sub-contract.

The defendant company allege that by a verbal agreement with the plaintiff, both during the progress and after the completion of the work under the sub-contract, the entire plant and horses of the plaintiff were to be security to the defendant company for any indebtedness found due on the completion of the works. And this position is endeavoured to be established by the evidence of George H. Webster and J. D. McArthur.

The witness Webster secured the execution by the sub-contractor of the agreement (exhibit 4), and at the time he says that it was understood that all the goods and effects of the sub-contractor were to be security to the principal contractor for the carrying out of the contract. I cannot find that on this occasion any agreement was entered into other than as contained in the writing exhibit 4.

The witness J. D. McArthur says that after the work was practically finished, and as the sub-contractor was breaking camp, he suggested to him that he bring in his camp effects, and that he would be allowed credit for them on his indebtedness to the company, and that this was agreed to.

This, however, is denied; the sub-contractor says that he never agreed to or intended thus parting with his plant and effects other than the portion thereof purchased from the defendant company and covered by the agreement exhibit 4, and I must find that this conversation was intended by Kert to apply only to the latter.

There was no agreement entered into by which the goods, the subject matter of this action, were pledged or otherwise given as a security to the defendant company for the indebtedness mentioned other than that contained in exhibit 2.

On 2nd July, 1907, Kert executed a bill of sale of the goods in question to the plaintiff, not as an absolute transfer, but as security for an indebtedness which he alleges he owed the plaintiff. This bill of sale was, for some purpose undisclosed, ante-dated; prior to the date of its execution the goods in question had been taken possession of by the defendant company.

There are several suspicious circumstances connected with the conduct of Kert in this transaction. The giving of the bill of sale itself, which he now admits was a security only, ante-dating it for the purpose, I have but little doubt, of making it appear that it was made prior to the defend-

ants' possession of the goods, and the evidence of Kert when he says, "I knew there might be a law-suit, and I thought my position stronger if a bill of sale made," and the non-attendance of the plaintiff at the trial, are circumstances which cause me to doubt the bona fides of the bill of sale, and to strongly suspect that the giving of it was simply a scheme to enable the plaintiff to succeed in this action for the benefit of Kert, without enabling the defendant company to set off their claim against him. The defendant company do not, however, attack the plaintiff's position otherwise than by claiming a prior right under their agreement (exhibit 2) with Kert.

Clause 3 of this agreement, in part, reads as follows: "3. All the powers conferred by the principal contract upon the Commissioners are hereby conferred upon the employer in respect of the works included in this agreement, and all the provisions in the said principal contract for the benefit or protection of the commissioners, are to enure to the benefit of the employer, as though specially provided herein in apt words. Without restricting the generality of this provision, it is hereby declared that it specially covers the matters referred to in paragraphs 5 to 32, inclusive, in said principal contract."

Under clause 19 of the principal contract (exhibit 7), "All machinery and other plant, materials, and things whatsoever, provided by the contractor for the works hereby contracted for, and not rejected under the provisions of the last preceding clause, shall, from the time of their being so provided, become and until the final completion of the said work shall be the property of the Commissioners for the purpose of the said works, and the same shall on no account be taken away or used or disposed of except for the purposes of the said works, without the consent in writing of the engineer, and the Commissioners shall not be answerable for any loss or damage whatsoever which may happen to such machinery or other plant, materials, or things, provided always that upon the completion of the works and upon payment by the contractor of all such moneys, if any, as shall be due from him to the Commissioners, such of the said machinery and other plant, materials, and things as shall not have been used and converted in the works and shall remain undisposed of, shall, upon demand, be delivered up to the contractor."

The above two clauses read together form a part of the agreement entered into between Kert and the defendant company, and under it the defendant company are entitled to hold all machinery and other plant, materials, and things whatsoever provided by Kert for the works, and the company having taken possession under this agreement, prior to the execution of the bill of sale to the plaintiff, are entitled to priority and to succeed as to such goods.

The horses brought by Kert upon the works are not included in the words "all machinery and other plant, materials, and things whatsoever," in clause 19 of the principal contract. This would seem apparent from the wording of clause 20 of the same contract, which reads, "And all materials and things whatsoever and all horses, machinery, and other plant," &c., shewing that horses were regarded as distinctive from plant, machinery, materials, and things whatsoever. I find, therefore, that the 4 horses brought upon the works by Kert are not within clause 19 referred to, and that the defendant company were not within their rights in converting them to their use. The plaintiff is entitled to succeed as to the horses, and there will be a reference to the Master to ascertain their value.

I reserve the question of costs and further directions.

MANITOBA.

MACDONALD, J. JULY 13TH, 1908.

TRIAL.

CHRISTIE v. SHROEDER.

Fraudulent Conveyance—Action by Judgment Creditor of Grantor, to Set aside—Security for Debt—Intent to Defeat other Creditors—Fraud—Preference—Assignments Act—Consideration.

Action to set aside a deed.

A. B. Hudson and D. Forrester, for plaintiff.

I. Pitblado, for defendant Elliott.

No one for defendant Shroeder.

MACDONALD, J.:—The defendant Shroeder entered into an agreement with the plaintiff for the purchase from him of 80 acres of land in township 1, range 3, east of the principal meridian, in Manitoba, for $2,500, and Shroeder, having made default in carrying out the conditions of the said agreement, was sued by the plaintiff, when Shroeder engaged the defendant Elliott as his solicitor and counsel to defend the action for him, and in connection with this defence became indebted to the defendant Elliott.

A few days prior to the trial the defendant Elliott recommended to Shroeder a settlement of the action, but, failing in bringing about such settlement, he, Elliott, insisted upon Shroeder securing him the costs incurred and to be incurred in connection with the defence, when the defendant Shroeder executed, by way of security only, a deed to the defendant Elliott of the north-west quarter of section 14 in township 1, range 3, east of the principal medidian, in Manitoba, and it is this deed that is sought to be set aside.

At the trial of the action in which the above referred to costs were incurred, the plaintiff recovered a judgment against Shroeder, but for an amount much less than the amount claimed, and, as such judgment creditor, he seeks to set aside the deed from Shroeder to the defendant Elliott, on the grounds that the defendants conceived the fraudulent design of transferring the said lands of the defendant Shroeder to the defendant Elliott and thereby preventing the plaintiff from recovering the amount of his said judgment, and that the defendant Shroeder was in insolvent circumstances and unable to pay his debts in full, and that the said conveyance was made with the intent to give the defendant Elliott a preference over the other creditors of the defendant Shroeder, and on other grounds of a similar character.

The evidence makes it amply clear that the defendant Elliott never sought or attempted to hold the conveyance otherwise than as a security, and this the plaintiff well knew long before he brought this action. The defendant Elliott offered to transfer the property back to Shroeder or to any one whom he might name upon payment of Shroeder's indebtedness to him.

Shroeder, who now favours the plaintiff, says that immediately after the law suit and before judgment he signed a paper in Elliott & Macneil's office, in the McIntyre block.

and that this was the first document he signed, and that he did not know what it was he had signed until the following July, when, he says, he discovered that he had given a deed of his land. Shroeder's evidence and conduct does not impress me favourably. He would have defeated the plaintiff out of his rights could he have managed it, and failing in that and also failing in enlisting the sympathy and assistance of his co-defendant Elliott in so doing, turns upon the latter and enlists upon the side of Christie to defeat his co-defendant Elliott.

He says the document he signed in Elliott & Macneil's office in the McIntyre block, after the trial of the action, was the deed in question. In this he is, to say the least, mistaken. The witness Magnussen prepared one duplicate of the conveyance, not at the office of Elliott & Macneil at the McIntyre block, but at their north end branch, which was at the time in charge of this witness. It was executed there a few days before the trial and witnessed by Marie Streich, a stenographer in that office.

At the time of discussing the giving of the security there were two mortgages against the property, and there were arrears on these mortgages. The defendant Shroeder was at the time unable to meet these arrears, and it was agreed that his co-defendant Elliott should look after these arrears and hold the deed of the property in question as security for any moneys thus paid by him, and he paid these arrears. The plaintiff furthermore offered the defendant Elliott $250 for a transfer to him of the property, and was told by the latter that he could not accept that amount, and could not in any case execute a transfer without Shroeder's consent, as he was only a mortgagee of the property.

I cannot see any trace of fraud in the conduct of the defendant Elliott. The giving of the deed instead of a mortgage, it is urged, is a mark of fraud. At the time of the making of the deed the amount of Shroeder's indebtedness was not ascertained, and the deed was to be a security for the amount of such indebtedness, when ascertained, and there never was any attempt to claim the property otherwise than as a security.

The defendant Elliott is entitled to hold the property as security for Shroeder's indebtedness to him. He insisted upon security being given before he would continue the

this land. Plaintiff, by his great delay, I think, lost that right. Fry on Specific Performance, p. 475, lays it down as clearly established that the delay of either party in not performing its terms on his part may constitute such laches as will disentitle him to the aid of the Court, and so amount to an abandonment, on his part, of the contract.

The application to purchase was made on 6th October, 1902, and nothing more was done until 27th September, 1905, when plaintiff asked how much was due. He does not even then do anything, and it is not until October, 1906, that he offers to make another payment. If this long delay is not of itself an abandonment, on his part, of the contract, I think that when defendant company wrote him the letter of 29th September, 1905, giving him until 20th October of that year to complete his contract, the fact that he did not accept that offer but delayed again for over a year is evidence that he abandoned his part of the contract, and if it had not been for the fact that land increased very considerably in value, he would never have sought to have the contract carried out. I think, therefore, that the plaintiff is not entitled to the relief asked for, and that there must be judgment for defendants with costs.

SASKATCHEWAN.

PRENDERGAST, J. JULY 8TH, 1908.

TRIAL.

SWANSON v. GETSMAN.

Fraud and Misrepresentation—Transfer of Land Procured by Fraud—Resale and Transfer by Fraudulent Grantee—Action to Set aside Transfers—Proof of Bona Fide Purchase for Value without Notice—Badges of Fraud—Estoppel—Registration of Transfers—Parties to Action—Trustee for Grantor—Injunction—Cancellation of Transfers.

Action to cancel a transfer of land.

J. A. Allan, Regina, for the plaintiffs.

W. S. Ball, Regina, for the defendant Getsman.

J. F. Frame, Regina, for the defendant McDonald.

PRENDERGAST, J.:—This action was instituted by Malcolm McInnis, then a farmer residing at Craik, in this province, to cancel a transfer of land from him to defendant Getsman—said defendant Getsman having subsequently transferred the same land to one Albert Shaw, who in turn transferred it to the other defendant, John L. McDonald.

The action was duly brought to trial, and, after argument, judgment was reserved.

Malcolm McInnis having died in the meantime, William Swanson, of Pense, and Benjamin J. Bott, of Craik, in their capacity of executors of his will, were then made parties to the suit as plaintiffs, and the style of cause was amended accordingly.

No defence was put in by Isabella Getsman.

The defence of John L. McDonald is to the effect that he has no knowledge of the circumstances under which the transfer from McInnis to Getsman was made, and that the then plaintiff ought not to be allowed as against him (McDonald) to allege fraud on Getsman's part, as by executing the said transfer he (McInnis) thereby enabled Getsman to appear as the owner of the said lands.

I may say at once that Malcolm McInnis would be about 26 years old, and as his solicitor emphatically did so in open Court, I would make the more free to describe him as decidedly simple-minded. His speech, in giving evidence, was inarticulate to the extent of being understood only with difficulty, and although tall and possibly muscular, he gave the impression of one born constitutionally weak and whose development has not been normal. I judged him at all events, from appearance alone, one easily led and imposed upon.

It appears that in the summer of 1906 Malcolm McInnis went to Minneapolis for medical treatment. After leaving the hospital where he had been two weeks, he met the defendant Isabella Getsman in the street near the place where she lived, and she invited him in.

Isabella Getsman is a married woman, and was living at the time in an annex to a stable or "house market," as it was called, apparently owned by her husband. Besides her husband, some stablemen were also living there, and possibly also one or two others.

Upon the occasion of their first meeting, McInnis and Isabella Getsman had illicit intercourse, for which McInnis says he paid her. It appears, however, that this was the

only time they had improper relations with each other. Whether that same day or shortly after, Isabella Getsman told McInnis that her name was Margaret Rivers, and he assumed that she was not married. She said she was just boarding at that place. McInnis paid her daily visits for about two weeks, in the course of which assurances of endearment were generally exchanged, without, however, any reference to marriage.

McInnis then went back to his homestead at Craik, from where he wrote her his first letter probably about 4th September, and this was followed by an exchange of correspondence which extended over the balance of that year. Isabella Getsman's letters, signed "Maggie Rivers," were produced have a new mayor; she laments the fact of being without at the trial. Besides the protestations of love which run all through them, she informs him (whatever that may refer to) that the police have closed her up, that she cannot make any money, and that she cannot open up again until they help and protection; she says how much she would like to go to him on the farm, where she would prove so true and devoted, and on two or three occasions asks for assistance in money. In the last letter she expresses her joy at hearing from him that he would shortly go to see her. There is also one letter, signed "Mrs. Getsman," apparently written after a period of silence on McInnis's part, in which she informs him that "Maggie Rivers" is very sick, longs for him, and requires monetary help. It appears that in the course of that correspondence, McInnis sent to the so-called Margaret Rivers 3 small sums of money, not exceeding probably $15 in all.

As he had announced to her, McInnis went back to Minneapolis about 20th January, 1907. He says in evidence that he had put up a house on the homestead for the purpose, and that he went down with the intention of bringing her back as his wife. Upon this second visit, the so-called Margaret Rivers for the first time spoke to McInnis of Mrs. Getsman; she said at first that she was a friend boarding with her, and later that she had left the place and was boarding elsewhere. At all events, on the second day after McInnis's arrival, they agreed to be married, in Minneapolis at first, and then she suggested it should be at Craik. On 12th February she told him that, as they were to marry at Craik, he should give her a transfer of the farm as a guarantee of good faith before she left. This

he consented to do. The next day, accordingly, she called by telephone a notary public, who came and prepared a transfer, which she executed. Having, however, found out that the transfer was not in such form that it could be registered here, they met again the following day, the 14th, when another transfer was prepared. This time she told McInnis that she did not want to tell her folks that she was going away to get married, and in order that they should not know, she asked him that the transfer should be made to "her friend" Isabella Getsman, which was done. McInnis executed the transfer in that form and left it with her. The following day she suggested that it would look better if he went away first and she followed him later, and the day after (15th February) he left for Craik.

Of course she did not follow him. But on 10th March, she curtly writes to him that, having waited patiently for a letter and the same not having come, she is leaving at the very moment to go to her mother in Scotland, where she intends to stay. To this letter McInnis, who had since taken advice from friends, made no reply.

In the meantime, however, Isabella Getsman found out that a transfer could not be registered here without production of the duplicate certificate of title, which in this case was with a loan company to whom McInnis had previously given a mortgage on the land; so that, reverting to the old expressions of endearment, she writes to him, always under the name of Maggie Rivers, a letter dated 29th April, enclosing a form of order on the company for the certificate of title which she asks him to sign, telling him that she has sold the farm, that she is threatened with imprisonment on account of not being able to give a good title, and promising to go back to him with the proceeds of the sale as soon as she gets the order. This letter was followed by two others to the same effect, dated respectively 6th May and 10th June, to none of which McInnis replied.

On 20th June we find Isabella Getsman at Craik station, where she meets by chance R. K. Catherwood, manager of the Canadian Elevator Company, and the Reverend Mr. Bott, who for some time past had been trying to assist McInnis in his troubles. She has not come to marry, however—"did they think she would marry a thing like McInnis?" She has come to get an order for the duplicate certificate, and she has a loaded revolver, too, and it is to bring McInnis to time. She tells them she is Margaret

Rivers, and she tells them she is Isabella Getsman as well, that her husband is John Getsman of Minneapolis, and that he is just the man "who will look that matter up." This incident came to a termination by her being put in charge of the police, after which she was brought before a magistrate on the charge of carrying a revolver, found guilty, fined $20, and given 24 hours to leave the place, which she did the next day.

All the above, except the last occurrence at Craik station, is on the evidence of Malcolm McInnis.

The following documents, all relating to the land in question, were produced by a clerk in the land titles office and put in by the plaintiff: first, certificate of title in the name of Malcolm McInnis dated 7th March, 1906; second, transfer Malcolm McInnis to Isabella Getsman, consideration $1, dated 14th February, 1907, first received 11th March, 1907, returned for completion, received second time 10th July, 1907, at 11.38 a.m.; third, transfer Isabella Getsman to Arthur Shaw, consideration $1,500, dated 15th February, 1907, received 11th March, 1907, returned, received second time 10th July, 1907, at 11.40 a.m.; fourth, transfer Arthur Shaw to John Leo McDonald, consideration "$10 and other valuable consideration," dated 15th February, 1907, received 10th July, 1907, at 11.42 a.m. None of the three transfers was registered. The three transfers and the duplicate certificate of title in the name of Malcolm McInnis were in fact received together by the registrar from the same firm of solicitors acting for the defendant McDonald in this action.

The same land titles office official produced a transfer from Malcolm McInnis to Aris P. Humphry, dated 29th April, 1907, received 13th July, 1907, not registered.

Also, first, caveat by McDonald, dated 7th May, 1907, filed 20th May, 1907; second, notice to caveator under sec. 141 of the Land Titles Act, applied for 12th July, 1907, and sent 19th July, 1907; third, order of my brother Newlands dated 11th July, 1907, restraining the registrar from registering the transfer from McInnis to Getsman until 26th July, 1907, and "until the motion therein to be made to continue the injunction shall be heard and determined;" fourth, reference to the Judge by the registrar, dated 18th July, 1907, with respect to all documents received in the matter up to that date; fifth, another order from my brother Newlands dated 30th September, 1907, and registered the

same day, continuing the above caveat until the hearing and determination of the action.

Malcolm McInnis also produced with reference to the said transfer from himself to Humphry a declaration by the said Humphry, dated 29th April, 1907, that he holds the said land in trust for the convenience, use, benefit, and advantage of him, the said Malcolm McInnis.

It also appears that the parties agreed at a certain time that they should stand in statu quo as to the effects of registration until the determination of the action; I am not quite sure, however, of the date of such agreement, although it appears to have been 30th September, 1907.

The above is the plaintiff's case. Now for the defence.

One of the witnesses called for the defence, Kleinman, testified as to the two meetings of 13th and 14th February, when the two transfers from McInnis to Getsman were made, and another witness, Conry, testified as to the last of those meetings.

Kleinman is the notary public who prepared the transfers. He says that on 13th February, after being called by telephone, he went down and found only Isabella Getsman and Malcolm McInnis in the house, that when going in he addressed Isabella Getsman as "Mrs. Getsman," and thereafter always addressed her and referred to her in the same way in McInnis's hearing. Conry says Isabella Getsman was introduced to him as "Mrs. Getsman" on the 14th, in McInnis's presence, but adds, "I guess" and "as best I recollect."

On that evidence it was contended for defendant McDonald that the transfer from McInnis to Getsman was not given in consideration of marriage, as he must have known that she was married. Perhaps it would not be a sufficient answer to that to say that McInnis, in his simple mind, may have believed that on the part of "Maggie Rivers" the passing herself as Mrs. Getsman was only part of their scheme that the transfer should be made to Mrs. Getsman in order to delude her ("Maggie Rivers's") folks. But there is also this fact, that all Isabella Getsman's letters to McInnis, not only before but after the transfer from McInnis was made, are signed "Maggie Rivers." And, which is absolutely conclusive to my mind, in her letter of 6th May (which is long after the making of the transfers and even after she had broken off and said she was going to Scotland) she says, "Send it" (the dup-

licate certificate of title) "at once, so I can come and get married to my dear Malcolm." It is not so, then, that McInnis intended to receive her on his homestead merely as his paramour, and I must hold that marriage was the consideration for the transfer.

Kleinman also says that after McInnis had executed the last transfer, the latter followed him to the door of Mrs. Getsman's house, and that he (Kleinman) then asked him why he was selling his land to Mrs. Getsman, to which McInnis replied that "she was better acquainted, a better talker, and could sell it better than he could." Whatever might be the exact meaning of those words, Kleinman says that he did not understand by that that McInnis had placed the title of the land in question in Mrs. Getsman merely for the purpose that she should act for him in finding a purchaser.

The rest of the defence is with respect to the transfer from McInnis to Shaw and Shaw to McDonald. It appears that both transfers were brought about by the agency of Kleinman. Charles P. Kleinman, aged 29, says he is a member of the Bar of Northern Minnesota, a notary public, and a real estate agent. He had no office at the time, but was using that of his brother, who occupies room No. 617 in the Phoenix block. I gather that whatever little work he did, was confined to conveyancing and real estate. He said he had known Isabella Getsman at the time for 6 or 7 months, having acted as attorney for her husband. He had known defendant McDonald for 3 years, and Shaw for less than a month.

Defendant McDonald says he is a notary public, real estate agent, secretary-treasurer of the American Railway Appliance Company, and has his offices in room 619, Phoenix block, adjoining those of Charles P. Kleinman's brother. He has lived 6 years in Minneapolis. At the trial he said that he has never met Isabella Getsman. He became acquainted with Shaw only on the day he took the transfer from him, and has not seen him since about 10 days after that occurrence.

Arthur E. Shaw is described by Kleinman as a real estate agent. He had no office in Minneapolis. None of the witnesses seem to have known where his residence was, and nobody knows where he is now. He was in and out the office of Charles P. Kleinman's brother for about a month before the 15th, and left the city a few days after.

The evidence of Kleinman and McDonald is to the following effect. In the afternoon of 14th February, after the second transfer from McInnis to Isabella Getsman was executed (and, I assume, after McInnis had left), Isabella Getsman told Kleinman she wanted to sell the land in question for $3,500 and described the improvements to him, whereupon Kleinman replied that he might be able to dispose of the land for her. Upon going back to his brother's office in the Phoenix building, where he apparently generally attended to such notarial and real estate work as came to him, Kleinman met Arthur E. Shaw, who, as already stated, was in and out the office a good deal. Kleinman spoke of the Craik land to Shaw. Shaw spoke of having 80 acres in Ottertail county, Minnesota, which he wanted to dispose of, and for which he was asking $1,200. Shaw wanted it arranged in such a way that he could get money instead of land in exchange, and agreed to pay Kleinman $100 if he could so arrange it. Kleinman proposed that in the meantime the terms between Getsman and Shaw might be considered to be on the following basis: total, $2,300; $400 cash, Getsman to take 80 acres at $1,100 and Shaw to assume the mortgage on the Craik land of $800. This being agreed to as a preliminary basis, Shaw went, on the same afternoon (the 14th), to defendant McDonald's office, which was in the adjoining room, and spoke to him of the Craik land, describing the improvements, saying that he knew himself of the land as being good, and stating the price as $2,400, of which $1,600 was to be cash, and the mortgage of $800 to be assumed by the purchaser. Kleinman did not mention Shaw to McDonald in the matter. McDonald said he would have to inquire the next morning about the value of the land from J. E. Martin, president of the Luse Land Company of St. Paul, and secretary of the Canadian Land Company of Minneapolis, two firms who apparently deal extensively in Canadian lands, and had field notes of the Craik district.

The next morning, 15th February, at 9.30, McDonald went to see J. E. Martin, whose office is also in the same building, but he was not there. Half an hour after he called again and saw him. Martin turned over the field notes, and, after getting the improvements and other particulars from McDonald, told him that land was worth between $12.50 and $15, and that with the improvements he could not lose any money by taking it at $2,400. I may here state

that J. E. Martin was called as a witness, and corroborated the foregoing in every particular.

At 11 o'clock Kleinman came to McDonald's office for an answer, and the latter told him that he would accept, upon which Kleinman left. Twenty minutes later Kleinman came back with Shaw, whom he introduced to McDonald, and asked the latter, as notary public, to take Shaw's acknowledgment of a deed of the 80 acres to Isabella Getsman, which he did. They say that, even at that time, McDonald did not know that this had any connection with the purchase which McDonald was going to make of the Craik land.

Kleinman and Shaw then went to Mrs. Getsman's, where Shaw gave her the warranty deed of the 80 acres and $400 in cash, in consideration for which Mrs. Getsman executed the transfer of the Craik land to Shaw and also gave him the transfer she had received from McInnis.

Kleinman and Shaw went back to McDonald's office in the afternoon, handed over to him the two transfers from McInnis to Getsman and Getsman to Shaw, and Shaw also executed a transfer to McDonald. McDonald then paid $1,600 in bank bills to Shaw. McDonald says he received $300 of that amount from the bank on a cheque which he produces, and that he had for some time in his safe $1,350 sent to him for investment by his sister, Mrs. E. Gallaher, a widow. McDonald put the 3 transfers in his safe, Kleinman and Shaw went away together, and the latter paid Shaw the $100 which had been agreed upon for his fee or commission.

As far as the oral evidence goes, I think that all the details of this somewhat complicated transaction are explained satisfactorily enough. What Shaw wanted was not an exchange of land but money, and so he did not want to go into the deal with Getsman, which would give him no money, but, on the contrary, call for a payment of $400 on his part, unless Kleinman arranged another deal by which he could get rid of the Craik land for a money consideration. Kleinman did arrange matters in this way, and that he secured McDonald's acceptance before divulging the name of either Getsman or Shaw, is only the course generally followed by land brokers in like circumstances. That McDonald first made independent inquiry about the value of the land is fully corroborated by J. E. Martin, who holds important positions in two large and substantial concerns. Whatever conclusions on other parts I may come

to later on in other matters, I feel that I should say here that I could see nothing at all in McDonald's demeanour and manner of answering questions that was against him.

I should add that the evidence of Kleinman and Martin was taken on commission.

There are, however, a number of circumstances connected with the transaction which appear to me to be very strange and are still unexplained. Here are some of them:

First, it is not strange, perhaps, that Shaw consummated his transaction with Getsman without asking evidence of the state of the title, because he apparently had Kleinman's assurance that the whole matter would pass from his hands at once. But I consider it very strange that McDonald should have paid $1,600 without asking for such evidence. It is true that he says that he first asked Martin, who seem to have been familiar with such matters, how the law stood, and that Martin told him: "The government backs the transfers there." But surely, as a business man and a notary public, he could not understand that the government would accept a transfer from one who has no interest in the land, and he had no evidence at all that McInnis had any such interest.

Second, the same applies to McDonald accepting Kleinman's word respecting the improvements, the amount of the mortgage which they said was on the land, and the arrears of interest which might be due thereon.

Third, the consideration in a certain way may be considered stated correctly enough at $1,500 in the transfer from McInnis to Shaw. But why should the consideration in the transfer from Shaw to McDonald be stated as "$10 and other valuable consideration," when the fact is alleged to be that McDonald simply paid Shaw $1,600 in bank bills?

Fourth, if it is not strange, it is at all events unusual, for a person having a bank account, as McDonald had, to keep $1,350 in bank bills for 30 days in a safe.

Fifth, McDonald was 10 days before sending any of the transfers for registration, when he should have felt that his position as to title was, to say the least, not at all safe.

Sixth, after 10 days only 2 transfers, being those from McInnis to Getsman and Getsman to Shaw, are sent for registration, the transfer from Shaw to McDonald being left in the safe for 40 days more. McDonald, however, offers this explanation, that this was due to an oversight on the part of his clerk.

Seventh, when Isabella Getsman went to Craik, what interest moved her to do so? Is it so, as she stated, that she had received no consideration at all from Shaw? Then Shaw is not a purchaser for value. Or is it rather that having received consideration, she was, as she also says, being threatened with criminal proceedings for not giving a good title? If such threats came from McDonald, it is strange that he did not speak of them at all, but, on the contrary, professes never to have met Getsman. And if the threats came from Shaw, it is strange that he, feeling that he was robbed, did not complain to Kleinman, which I assume to be the case from the fact that Kleinman did not refer to such threats at all in his testimony.

Eighth, another strange circumstance to which counsel did not refer is that on 26th March and 16th April Mrs. E. Gallaher writes two letters to a real estate firm at Craik asking them to find a tenant for the land in question. If she was really the owner, why was not the transfer from Shaw made to her? If, on the other hand, McDonald judged proper to take the transfer of the land in his own name to manage it for her, how is it that she steps in to find a tenant herself, and discusses shares, wheat, oats, flax, potatoes, implements, improvements, etc., the very matters, if at all, that McDonald should attend to on her behalf? Would not the writing of the two letters signed "Mrs. E. Gallaher," and the withholding from the registry office of the transfer from Shaw to McDonald, be separate evidence of the same intention, namely, that it should not be known then, in anticipation of some trouble, that McDonald was the last purchaser and the actual holder of the land?

Ninth, without attaching too much importance to the fact, I would also say that it is at all events a strange coincidence in names that Isabella Getsman, on her trip to Craik, should have given to the Rev. Mr. Bott the name of her attorney as "McDonald."

Tenth, there is, moreover, an element of vagueness and uncertainty in the personality of Shaw, who appears to be known only from his brief stay of less than 40 days in Minneapolis. Nobody seems to know where he came from, and nobody seems to know where he has gone to.

In this, as in other similar conditions of human affairs, I am free to say that I could not point to any particular one of the circumstances last referred to, and state with positive assurance that it cannot be in any way satisfactorily ex-

plained. But there are too many of such events for that I should believe that chance alone grouped them together; they constitute too clear a departure from the usual sequence of events logically connected; and I am thus driven to the conclusion that, taken as a whole, they point manifestly to something having occurred, to the knowledge of the defence, which the defence has studiously withheld; and, that being so, I must hold that it is not shewn that Shaw and McDonald are bona fide purchasers for value.

Of course, even if he had knowledge, McDonald could take advantage of Shaw's status; but the above remarks apply equally to Shaw, and even more so.

It is also true that fraud will not be presumed; but fraud may be established by inferences as well as any other fact.

Reference was also made to negligence on the part of defendant McDonald: Foster v. McKinnon, L. R. 4 C. P. 7, 11; Baxendale v. Bennett, 3 Q. B. D. 525. I do not think this plays any part here, because McDonald is not in the position that he is on account of his negligence. The usual inquiries from the land titles office or his insisting on the production of the duplicate certificate of title, would not have brought to his knowledge anything that he did not know already. It would not have made him cognizant of Getsman's fraud. But, on the other hand, his negligence or indifference is of the very greatest value as evidence, and I greatly rely upon it in coming to the conclusions which I have reached above.

It is not necessary to distinguish here between void and voidable contracts. The broad principle which applies to this action is one of estoppel, and it is to the effect that if any person executes an instrument with a mind and intention to execute it, though his assent might have been obtained by fraud, he is estopped from denying its validity as against persons who, relying on the same, have become bona fide purchasers for value: Henderson v. Williams, [1895] 1 Q. B. 521; King's Norton Metal Co. v. Edridge, 4 Times L. R. 99; Ewart on Estoppel, pp. 104 and 434.

The two following cases cited for the defence, Pease v. Gloahec, L. R. 1 P. C. 219, and Goodwin v. Roberts, 1 App. Cas. 476, are not applicable here, the judgment having gone on the principle governing negotiable instruments.

It was also objected for the defendant that the registrar should have registered the three transfers received 10th July, and that for that reason McDonald should be con-

sidered in the same position to-day as if certificate of title had actually issued to him. But, whatever the registrar should have done on the facts that he had before him, I hold that McDonald was not entitled to have the said transfers registered, for the reason that, though the duplicate certificate of title may then have been de facto produced to the registrar on his behalf, the only parties then having the right to the possession of the said duplicate certificate were either McInnis or the loan company for McInnis.

With respect to the objection that, owing to the transfer which he made to Humphry, McInnis had no standing in this Court, I hold that, as Humphry holds the land in trust for McInnis, the latter had such a beneficial interest as entitles him to maintain the action, which, moreover, does not aim at disturbing, but on the contrary tends to protect, Humphry's title such as it is.

It was also stated that the Judge would not have granted the restraining order had he been aware of the effect of the transfer from McInnis to Humphry. All I have to say as to this is, that the restraining orders were in fact granted, and I do not know what conveyances, if any, were thereby prevented from being registered. I can only take the records of the land titles office as I find them, and deal with the material as it comes before me.

There will be an order for the delivery of the transfers made by McInnis to Getsman, by Getsman to Shaw, and by Shaw to McDonald, to be cancelled, and vacating the caveat filed on behalf of defendant McDonald, with costs to the plaintiffs.

SASKATCHEWAN.

WETMORE, C.J. JULY 9TH, 1908.

CHAMBERS.

CANADIAN PACIFIC R. W. CO. v. MANG.

Land Titles Act—Sale by Order of Court in Action for Foreclosure—Reference to Sheriff to Sell — Order of Judge Confirming Sale Made—Inapplicability of sec. 132 of Act—Immediate Operation of Order—Duty of Registrar of Land Titles—Issue of Certificate of Title to Purchaser.

Reference by a registrar of land titles under the Land Titles Act.

A. L. Gordon, Regina, for the purchaser.

WETMORE, C.J.:—Foreclosure proceedings were had, and the Judge by whom the order was made ordered a sale under the direction of J. M. Duncan, the sheriff. The order was in the usual form, and directed that, upon a sale being made and confirmed by a Judge, the title to the mortgaged premises should vest in the purchaser. A sale was made, which was duly confirmed, and the registrar declined to cancel the existing certificate of ownership and grant a new one to the purchaser until the expiration of the 4 weeks mentioned in sec. 132 of the Land Titles Act. The reason for so objecting apparently was that this was a sale made by a sheriff, and therefore came under the provisions of that section.

I have no hesitation in holding that the fact of Mr. Duncan being the sheriff was not of any consequence, because he did not sell by virtue of his office as sheriff—he was merely persona designata. Any other person than the sheriff might be, and frequently is, appointed to conduct such sales, and, if the section would not be applicable to any other person than a sheriff so appointed, it would not be applicable to a sheriff. The doubt in my mind was whether the section would not apply to a sale of this character. It is, in my opinion, quite clear that the person, whoever he might be, whether sheriff or not, appointed to conduct such sale, is an officer of the Court; but is he an officer of the Court intended by sec. 132? I was disposed for some time to be of the opinion that he was, and that that section applied to him. But, on carefully reading the provisions of the Act, I have come to a different conclusion. Section 129 provides that "the sheriff or other duly qualified officer after delivery to him of any execution or other writ then in force affecting land," etc., shall register a copy of the execution. Then section 132 provides that "no sale by a sheriff or other officer as aforesaid under process of law, of any land for which a certificate of title has been granted, shall be of any effect until the same has been confirmed by the Court or a Judge." Then sub-sec. 2 of that section goes on to provide that "the registrar, upon the production to him of the transfer . . . with proof of the due execution thereof, and with an order for the confirmation of such sale indorsed upon the transfer or attached thereto, shall, after the expiration of 4 weeks after receiving the same, unless such registration is in the meantime stayed by the order of the Court or Judge, register the

transfer, cancel the existing certificate of title . . ., grant a certificate of title to the transferee, and issue to him a duplicate in the prescribed form." It will be noticed that the provision is, that no sale by a sheriff or other officer as aforesaid shall, etc. Now to what do the words "as aforesaid" apply? To my mind, they apply to an officer specified in sec. 129, namely, one exercising the functions of a sheriff, and a sale "under process of law" means a sale under and by virtue of an execution or other writ of a similar character; it does not apply to sale by virtue of a decree of the Court. The difficulty that I experienced in reaching this conclusion was that there was no provision in the Act for the confirmation of a sale under a decree of the Court, unless it was to be gathered by implication from sec. 132. Under the practice I was accustomed to when at the Bar, such a thing as the confirmation of a sale was not known. A decree was made for sale. A sale was made; and if the preliminaries provided for in the decree were observed the transfer would be valid, but it would be upon the party setting up the transfer to prove that these preliminaries had been duly taken. If they were not duly taken, the transfer would be of no effect. The Court left the matter of the question of the validity of the title to proof—there was no confirmation. The Court, however, has yet authority beyond all question to make decrees of foreclosure, and to make decrees for the sale of land in any case where it is desirable there should be a sale, and, in view of the provision of the Land Titles Act, whereby the certificate of title is conclusive evidence of ownership, the Court would be careful, before a transfer is placed on the register and a certificate of title issued, to call all persons interested before it and ascertain whether the preliminaries to the sale had been carried out properly before it would authorize the old certificate of title to be cancelled and a new one issued. That is a procedure which would naturally grow out of the state of things, and therefore the provision that the transfer was not to have effect until it was confirmed would be properly and naturally put in the decree under the existing state of affairs. That being done, the transfer is made—not by the sheriff or other officer under a process of law—but by virtue of a decree; and when everything has been properly done so that the Court is satisfied that the title ought to pass to the purchaser, it is at liberty to decree that it shall pass, and when an order or confirmation

is made of a transfer of land sold under the decree of the Court or a Judge, in my opinion it operates instanter.

Another question has been raised: that the registrar has no evidence that the preliminaries to the sale have been taken by the officer selling. To my mind, it is not necessary that he should have. The order of the Court or Judge confirming the sale is quite sufficient to satisfy him that the preliminaries have been properly taken. In my view of the case, all this proof of the preliminaries having been properly taken is a matter for the Court—not a matter for the registrar. The Judge is to determine whether the proper steps have been taken, not the registrar, and when the Judge determines that they have been, and confirms the sale, and the order confirming is filed with the registrar, that is all it is necessary he should have. The proof and documents on which the order is made are filed with the local registrar of the Court.

I am of opinion, therefore, that the registrar should at once consider the title vested and cancel the old certificate of title and issue a new one to the purchaser.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

GILROY v. PROE.

Mortgage—Foreclosure—Defence — Extension of Time for Payment of Instalment — Agreement — Consideration—Oral Contract—Evidence.

Appeal by defendant from order of JOHNSTONE, J., ante 81, in favour of plaintiff upon an application by way of originating summons for foreclosure and immediate possession.

C. E. D. Wood, Regina, for defendant.

James Balfour, Regina, for plaintiff.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—It was set up by defendant in answer to the foreclosure proceedings that, in consideration of his having given the plaintiff a bill of sale of all his chattels, she agreed to extend the time of payment and allow him to remain on the farm until the fall of 1908. This was denied by both plaintiff and Mr. Balfour, her solicitor, who conducted most of the negotiations. It was held by the learned trial Judge that "an agreement for good consideration to extend the time for payment of an instalment of principal and interest or both can be enforced: Williams v. Stern, 5 Q. B. D. 409 (in appeal); but such agreement when verbal must be supported by evidence clear and convincing. The evidence adduced here on behalf of the defendant in support of his contention is not clear and convincing. It is clear that there was no express agreement. Even from the point of view of the defendant's case, this must be conceded. His contended arrangement is a matter of inference drawn from observations made by Mr. Balfour, which inference I find was not warranted under the circumstances."

Unless the agreement was to extend the time for the payment in arrear, I cannot understand what Mr. Balfour meant when he said: "A. Well, Miss Gilroy was very averse. She didn't wish to have to take these proceedings, and we had an interview with Proe. I cannot recollect the date, but it would be in December, I think, some time, and Proe was very anxious to continue on the farm, and did not wish us to take these proceedings; and I told Proe, and Miss Gilroy herself also told Proe, that the only ground upon which we could let him continue on that land was for him to return to her all the goods and chattels which had been sold to him with the farm, and for which he had really paid nothing on account. Q. What was the purpose of returning these goods and chattels to her? A. Because if Proe were allowed to continue on the land and continued farming in the same way that he did, and conducting himself in the same way that he had, Miss Gilroy and I were both convinced that in the fall he would be so much involved in debt that the creditors would step in and take all these goods and chattels and shut Miss Gilroy out. Q. It was not, however, the intention that she should take actual possession of these chattels, I presume? A. I don't understand your question. Q. Was it the intention that she should take actual physical possession of those chattels? A. Not immediately, no. Q. As I under-

stand you, the proposition was that the chattels should be assigned to her, so that in the fall if he did not pay her on account of what he was owing her, they would be safe from any other creditors? A. That was the way she would be protected. Q. So that in the fall if these other creditors were pressing him, she would be protected? A. The idea was that for all time to come, so long as the agreement continued between Proe and Miss Gilroy, that she would be secured, as I had urged her at the time of the sale to take a chattel mortgage upon all this stuff, but she didn't agree to do that because she did not wish to hamper Proe's credit."

Now the effect of this agreement, to use again Mr. Balfour's language, was: "It was contemplated he was going to work that place until the expiration of that mortgage, so long as he conducted farming operations properly and conducted himself properly, because he had promised to do those things as I have stated, and we were going to give him another chance to do them. I might just say, however, the fall of 1908 was never mentioned. The whole point was whether or not we would allow him to remain on the farm in general."

Before the bill of sale was signed, defendant asked for a writing signed by plaintiff shewing that these chattels would be returned to him when he paid the full amount due on the mortgage. This Mr. Balfour promised to get before registering the bill of sale. He had this document prepared, but on 14th January, two days after the bill of sale was executed, plaintiff refused to go any further with the negotiations. As to this, Mr. Balfour says: "The 14th of January, when she had concluded that there was no use in doing anything else but take proceedings against Mr. Proe, that from what she heard he was drinking again. Then she said it was no use trusting him any further."

Now it seems to me from Mr. Balfour's evidence, that the agreement between the parties was that if defendant would give plaintiff a bill of sale of all his chattels, she would allow him to retain possession of the farm, providing he conducted himself and his farming operations properly.

If, therefore, this was the agreement, could plaintiff refuse to carry it out? Only, I think, if the condition was not fulfilled, and the defendant should, after it was entered into—which would be 12th January, the day the bill of sale was signed—not conduct himself or his farming operations

properly. It fixed a new time and a new manner in which a default could occur, and in order to foreclose after that date, and before another payment would be due, plaintiff would have to prove that the condition had not been kept, and that the defendant was therefore again in default. The only evidence before the Court that this default had occurred is plaintiff's statement, two days after the agreement was entered into, that she heard defendant was drinking again. As this is not evidence, there is nothing before the Court shewing that defendant is in default under the agreement of 12th January, and therefore plaintiff has not proved her right to foreclose.

One other version of this agreement suggests itself, and that is, that it was only to be effective if plaintiff signed the agreement. This, however, could not be the case, because, after plaintiff had refused to sign it, the defendant asked Mr. Balfour to return him his bill of sale, but he refused to do so, shewing that plaintiff's solicitor considered he had the right to retain it, even although the agreement was not signed. Defendant also swears that the agreement between them was complete when the bill of sale was signed.

I think the judgment of the learned trial Judge should be reversed, the proceeding dismissed with costs, the defendant to have the costs of this appeal.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

EXCELSIOR LIFE INSURANCE CO. v. PRESTNIAK.

Mortgage — Foreclosure or Sale — Originating Summons—Defendant not Appearing—Discretion of Judge—Right to Order Sale—Rule 452.

Appeal by plaintiffs from an order of LAMONT, J., in Chambers, upon the return of an originating summons obtained by plaintiffs as mortgagees of land, refusing to direct foreclosure as prayed by plaintiffs, but directing a sale of the mortgaged lands.

T. S. McMorran, Regina, for plaintiffs.

No one for defendant.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, and JOHNSTONE, JJ.), was delivered by

JOHNSTONE, J.:—On 22nd January last the plaintiffs obtained an originating summons under Rule 452 of the Judicature Ordinance, calling upon the defendant to attend before the presiding Judge in Chambers on 21st February, 1908, on the hearing of an application on behalf of the plaintiffs, because of default, for an order for sale of the lands contained in the mortgage in question, or for an order of foreclosure of the equity of redemption of the defendant in such lands.

The application for this summons was supported, with other material, by the affidavit of the manager of the plaintiffs, who deposed to default and to the value of the lands. It appears from this affidavit that the whole amount secured by and then past due for principal and interest under the mortgage was $616.55. The value of the lands, with all improvements, was placed at $1,500.

On the return day the application came on for hearing before my brother Lamont, who directed a sale. The order for sale on its face sets forth the non-appearance of the defendant on the return, although duly served, and that on the hearing the plaintiffs had requested an order for foreclosure and not an order for sale. From this order the plaintiffs appeal on the following grounds: (1) that the order was against law and evidence; (2) that the learned Judge erred in directing a sale of the lands in question, instead of a foreclosure.

The Rule referred to, namely, 452, is as follows: "A mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may obtain an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say: sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee."

The question does not arise whether or not the presiding Judge would have any discretion to order a sale on originating summons in the case of foreclosure simply, but whether the plaintiffs, in the first instance, having asked for an order for sale, or for foreclosure in the alternative, could on the return of the summons ask for and insist upon an order for foreclosure, and thereby preclude the Judge from exercising any discretion under Rules 449 and 453 as to which relief should be granted, should the circumstances warrant and point to the making of an order for sale in preference to that of foreclosure.

I cannot agree with this contention. Were the proceedings to realize to be taken by way of suit or by way of action for foreclosure, it might with reason be urged that a Judge, in the absence of a request from some person interested for an order for sale instead of foreclosure, could not under the circumstances arising in this case direct a sale. But this question does not arise here, and I think it was open to the learned Judge on the application to exercise his discretion and to refuse to make the order asked for. I think the plaintiffs, because of the form of their application, were precluded from taking the position they did in insisting on foreclosure. The provisions of the English Acts, namely, sec. 48 of 14 & 15 Vict. ch. 86, and sec. 25 of the Conveyancing Act of 1881, and the decisions thereunder cited in support of the appeal by counsel, do not appear to me to have any application, for the reason stated. In my opinion, this appeal should be dismissed. No costs.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

BEAVER LUMBER CO. v. NORTHERN CONSTRUCTION CO.

Attachment of Debts—Moneys Attached Paid into Court by Garnishees—Claim by Assignees of Judgment Debtors—Judgment Creditors Setting up Defence Irrevocable by Garnishees—Invalidity of Contract—Foreign Companies Ordinance.

Appeal by plaintiffs (judgment creditors) from an order of NEWLANDS, J., in Chambers, upon the return of a gar-

nishing summons, directing payment out to the Bank of Hamilton, claimants, of the moneys paid into Court by the garnishees, the Belbeck Elevator and Trading Company.

C. W. Craig, Moose Jaw, for plaintiffs.

N. Mackenzie, K.C., for the claimants.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.,) was delivered by

PRENDERGAST, J.:—The defendants are a foreign company, who have not registered under the Foreign Companies Ordinance.

The garnishees, being served with a garnishee summons, have paid the amount due into Court.

The Bank of Hamilton claim the money paid into Court by virtue of an assignment from the defendants previous to the attachment.

On these facts my learned brother Newlands ordered the money to be paid out to the claimants, and from this order the plaintiffs appeal.

The grounds of appeal are "that the contract in respect of which the moneys paid into Court were claimed by the respondents was made in whole or in part in the province of Saskatchewan, in the course of or in connection with business carried on without registration, contrary to the provisions of sec. 3 of the Foreign Companies Ordinance," and that "the claimants as assignees have taken the claim subject to all defences which might have been pleaded against the assignors."

The answer to this seems to be that whatever defences could be made to the defendants' claim against the garnishees could only be so made by the garnishees themselves. The plaintiffs have no warrant or authority to speak for the garnishees in this respect, no more than the claimants.

The garnishees, however, very far from setting up any defence at all, have admitted their liability and paid the money into Court.

Then, even if the plaintiffs could set up defences in the name of the garnishees as against the claimants, the claimants could do the same as against the plaintiffs. Whatever defences the garnishees could avail themselves of against the claimants as assignees, they could also, broadly speaking,

avail themselves of against the plaintiffs as attaching creditors, and the result would be (if the defences were maintained), that there would be no debt at all due by the garnishees, and that both the garnishee order and the claimants' claim would be vacated.

The whole point is, that the objections relied upon by the appellants lie with the garnishees only, who have not chosen to avail themselves of the same.

The appeal will be dismissed with costs.

THE

Western Law Reporter

VOL. VIII. TORONTO, SEPTEMBER 8, 1908. No. 10

MANITOBA.

MATHERS, J. JULY 17TH, 1908.

TRIAL.

MUNROE v. HENBACH.

Vendor and Purchaser—Contract for Sale of Land—Option and Acceptance — Provision for Formal Agreement — No Formal Agreement Executed—Action by Vendor for Instalment of Purchase Money—Action Maintainable — Waiver of Right to Formal Agreement—Interest—Delay —Default in Making Title—Possession—Vacant Lands— Costs.

Action to recover an instalment of the purchase price of land. The instalment sued for fell due on 1st September, 1907, and the action was begun on 22nd November, 1907. Subsequent to the commencement of the action the principal was paid; and the only matters in dispute were the interest subsequent to the due date of the instalment and the costs of the action. The defendant contended that the action was prematurely brought, by reason of a formal agreement of sale not having been prepared and executed.

A. B. Hudson and A. V. Hudson, for plaintiffs.

A. C. Galt, for defendant.

MATHERS, J.:—On 6th December, 1905, the plaintiffs gave the defendant a written option to purchase a large block of land, then believed to contain about 800 acres, in the name of himself, or his nominee. The option was to continue until 1st September 1906, up to which time the

defendant was to have the right to purchase the lands for the price of $175 per acre, payable $50,000 in cash upon the acceptance of the offer and the balance at the expiration of one and two years from the date of the acceptance of the offer, with interest at 6 per cent. and the privilege of paying the whole unpaid purchase money or any portion at any time in cash with interest on the amount so paid at the rate of 6 per cent. to the date of payment.

The option agreement further provided for a subdivision of the property by the defendant, if he desired it; that upon payment of the purchase price he should be entitled to a transfer of the land in fee simple free from incumbrances; and that, should the defendant sell any portion of the lands covered by the option, the plaintiffs would execute a transfer or conveyance of the lands sold to the defendant, or his nominee, provided that the amounts at which the portions of the land were sold had been agreed upon between the plaintiffs and defendant, and in the event of their being unable to agree, then provided the selling price was at a fair valuation to be determined by named arbitrators.

On 1st September, 1906, the defendant accepted the offer contained in the option agreement by a letter written to the plaintiffs, the material parts of which are as follows:—

"Winnipeg, 1st Sept., 1906.

"The Munroe Pure Milk Co., Ltd.,
and David Munroe, Esq.,
c/o Merchants Bank of Canada,
Winnipeg.

"Dear Sirs,—I beg to advise you that I accept the option contained in agreement dated 6th December, 1905, made between the Munroe Pure Milk Co., Ltd., of the first part, myself, of the second part, Mr. David Munroe, of the third part, and Messrs. Wickson & McKenzie, of the fourth part, for the purchase, and I agree to purchase all the lands in the first part of the schedule in the said agreement and that part of the lands in the second portion of the agreement which lies to the north of the lands taken for the right of way of the Northern Pacific and Manitoba Railway, at and for the price of $175 per acre, payable in the manner set forth in the said agreement. . . . I shall be pleased to have you arrange for the preparation of the formal agreement of sale in the name of the Warner Land Co., Ltd."

In addition to the provisions already stated, the option agreement contained the following clause: "Upon the exercise of the said option a formal agreement of sale shall be entered into between the company and the third party as vendors and the second party as purchaser, containing such terms and conditions as are suitable and usually contained in the form of agreement of sale in common use by the firm of Tupper, Phippen, & Co., and the company and the third party shall cause all necessary parties to join therein for the purpose of effectuating the intention of the parties thereto." It was this formal agreement that the defendant referred to in the last clause of his letter above quoted.

No formal agreement was ever prepared or executed, and the defendant contends that the action is not, therefore, maintainable. The determination of that question depends upon whether or not the option and its acceptance constituted a completed agreement between the parties. If a complete and binding agreement was thereby created, the mere fact that there is provision for putting its terms into more formal shape does not prevent its enforcement, although the formal agreement is not executed. The law on this subject is thus stated by Lord Westbury in Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 638: "I entirely accept the doctrine contended for by plaintiff's counsel, and for which they cited the cases of Fowle v. Freeman, 9 Ves. 351, Kennedy v. Lee, 3 Mer. 441, and Thomas v. Dering, 1 Keene 729, which establish that if there had been a final agreement and the terms of it were evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms . . . there exist all the materials which this Court requires to make a legally binding contract. But, if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

It is a question of the proper construction of the offer and acceptance as to "whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement the

terms of which are not expressed in detail:" per Jessel, M. R., in Winn v. Bull, 7 Ch. D. at p. 32.

In the present case all the terms of purchase are expressed in the option agreement, and the preparation of another agreement could only serve the purpose of putting the terms agreed upon into more formal shape. The chief argument of the defendant's counsel was that the option agreement did not fix definite amounts upon the payment of which specified portions of the lands would be conveyed, and that this was a matter left to be settled by the formal agreement. The answer to that argument is that the option agreement does make provision for the conveyance of parts upon payment of amounts to be determined in the manner therein provided, and there is nothing left to future negotiations. In my opinion, the option and its acceptance constituted a binding and enforceable agreement between the parties.

But, even if it be otherwise, the defendant has waived his right to have a formal agreement executed. In his letter of acceptance dated 1st September, 1906, the defendant says: "I shall be pleased to have you arrange for the preparation of a formal agreement of sale in the name of the Warner Land Company, Ltd." There is conflicting evidence as to whether or not the preparation of this agreement was or was not suspended at the defendant's request. I think the question can be decided apart from the oral evidence of the parties. In July, 1907, the defendant entered into an agreement for the sale of a considerable portion of the property. He applied for and obtained a conveyance of such portion from the plaintiffs upon payment of an amount agreed upon between the parties. This constituted, to my mind, a waiver of the right to a formal agreement. By the terms of the option agreement an instalment of purchase money fell due on 1st September, 1907, and the action was brought on 22nd November, 1907. I hold, therefore, that the action was not premature.

It only remains to decide the question of the defendant's liability to pay interest subsequent to 1st September, 1907.

It would appear that no steps were taken by the defendant to have the title searched until after he had sold a portion of the lands in July, 1907. Some delay then took place in arranging with and obtaining discharges from mortgagees for the portion sold and in removing a caveat filed against the land. The defendant was relying upon the proceeds of

his sale to pay the plaintiffs' instalment which fell due on 1st September, and, as that sale had not been completed, the defendant applied for and obtained a two weeks' extension of time for payment. Neither the plaintiffs nor the defendant had taken steps until after 1st September, 1907, to ascertain the exact acreage. The plaintiffs apparently relied upon the defendant to have this done, because on 26th August their solicitor wrote the defendant to inquire if the acreage had been ascertained by a surveyor. About the end of October the acreage had been ascertained, and the objection to title removed.

It is contended by the defendant that he is not liable to pay interest for the period subsequent to 1st September, on the ground that the delay in payment was due to the plaintiffs' default in making title. I think the defendant was in possession of the lands as far as a person can be said to be in possession of vacant lands. He had entered into a contract for the sale of a portion of it, thereby exercising acts of ownership over it. This he did, I think, intending to assume the ownership of the land and to deal with it as his own. This is equivalent to possession in so far as the question of interest is concerned: Ballard v. Shutt, 15 Ch. D. 122. The defendant did not set apart the money in a separate account pending the completion of the title, and, unless that is done, he is liable to pay interest, even if the delay were due to the default of the plaintiffs. As stated by the Chief Justice of the Supreme Court in Stevenson v. Davis, 23 S. C. R. at p. 631: "The respondent being in possession and being bound by the contract to pay interest (reciprocal terms), he could not, according to the established principles of courts of equity, be exonerated from his liability for interest so long as he retained the possession, unless he brought himself within two essential conditions. These conditions require, first, that the vendors should be in wilful default, a somewhat vague and not very appropriate expression used in such cases; secondly, that the purchaser should deposit the purchase money in a bank or other proper place of deposit, not to his general current account, but to a separate account, so that he might be in a position to retort when his objection to pay interest was made by the fact that he was enjoying the possession of the land, that he was losing the use of the purchase money."

I understand the plaintiffs only claim interest on the instalment of principal sued for from 1st September, 1907,

until the date of payment. There will be judgment for the plaintiffs for such interest and costs of and subsequent to trial only.

I see by the correspondence put in that the plaintiffs were willing to settle before trial without costs. By getting the costs of the trial, they will be in the position with respect to costs that they were willing voluntarily to assume.

BRITISH COLUMBIA.

JULY 24TH, 1908.

FULL COURT.

REX v. NARAIN.

Constitutional Law — British Columbia Immigration Act, 1908—Ultra Vires—B. N. A. Act, sec. 95—Legislative Field Occupied by Dominion Legislation—Costs against Crown.

Appeal by the Crown from order of MORRISON, J., in Chambers, 7 W. L. R. 781, discharging defendants from custody under a conviction for an offence against the British Columbia Immigration Act, 1908.

The appeal was heard at Vancouver on 29th April, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

A. D. Taylor, K.C., for the Crown. The province has power to pass this legislation, and such legislation is in force so long as it is not repugnant to Dominion legislation. It is here not so much a question of jurisdiction as repugnancy.

[HUNTER, C.J.:—The question is, whether it is operative.]

There is no Dominion legislation imposing an educational test. The province has simply debarred illiterates.

[HUNTER, C.J.:—By sec. 13 of the Dominion Immigration Act, the Governor in council is clothed with power to impose further tests at any time. The Dominion having dealt with the question, how, therefore, can any legislature deal with it?]

We submit that, so far, there is no Dominion legislation dealing with it. As to part of the statute being valid and

part invalid, see Attorney-General for the Dominion of Canada v. Attorneys-General for the province of Ontario, Quebec, and Nova Scotia, [1898] A. C. 700, at p. 709; Union Colliery Co. of British Columbia v. Bryden, [1899] A. C. 580. Then the presumption is in favour of the Act.

[HUNTER, C.J.:—The effect of that is, that the government having power to say in their discretion whether certain classes shall not be admitted, does it not follow that until the government specifically say so, those classes shall be admitted?]

Not necessarily; the Dominion Government must move in the matter, and until they do, there is no conflict.

Brydone-Jack, for the defendants, not called upon.

Per Curiam:—By sec. 30 of the Dominion Immigration Act, the Dominion Parliament has delegated to the Governor in council the whole matter of immigration; and we have a complete code as to what class or classes of immigrants shall be admitted or excluded. From secs. 17 and 53 it must be reasonably plain that the field has been occupied. The provincial Act would seem to be inoperative so long as Parliament leaves the legislation in the position it is. The appeal should be dismissed with costs.

Taylor.—As to the question of costs against the Crown, see Johnson v. The King, [1904] A. C. 817.

The judgment of the Court on the question of costs was delivered by

HUNTER, C.J.:—In this case the Court has decided to adhere to the rule of practice laid down 10 years ago in the case of Regina v. Little, in which it was established that the Court would and should on occasion give costs either for or against the Crown. That practice as then established has never been interfered with by the authorities, although they have had frequent occasion to change the Rules; and therefore it must be understood, so far as we are concerned, that we will not interfere with it, especially as, in our opinion, the practice is reasonable.

ALBERTA.

SCOTT, J. JULY 23RD, 1908.

TRIAL.

NIBLOCK v. ROSS.

Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase Money by Instalments—Action for Instalment—Counterclaim for Rescission of Contract — Mortgage and Transfer by Vendor Subsequent to Contract—Transfer in Trust—Judgment for Payment of Instalment into Court.

Plaintiff's claim in this action was under an agreement for the sale of certain lands in Calgary, dated 4th April, 1907, whereby defendant agreed to purchase the lands for $6,000, payable $1,500 upon the execution of the agreement, and the remainder in 3 equal payments of $1,500 each, at 6, 12, and 18 months from the date thereof, with interest at the rate of 8 per cent. per annum from the date thereof. Plaintiff alleged that by a subsequent arrangement between him and the defendant the time for payment of the balance remaining unpaid upon the second payment, which fell due on 4th October, 1907, was postponed. He now sued for the third payment, which fell due on 4th April, 1908, and the interest thereon, less the sum of $100, which he admitted having received from defendant on 24th December, 1907.

C. F. Adams, for plaintiff.

G. H. Ross, for defendant.

SCOTT, J.:—Defendant in his defence alleges that at the time of payment of the $100, and in consideration of such payment, the plaintiff agreed to extend the time for the payment of the balance of the third payment until 4th October, 1908; but the defendant has failed to prove to my satisfaction that such an agreement was entered into.

It was shewn that on 25th June, 1907, plaintiff mortgaged the property to one Loder for $2,500 and interest, which mortgage is still outstanding, and that on 9th January, 1908, the plaintiff transferred the property to his

wife, who at the time of the commencement of the action was the registered owner thereof. On 13th February, 1908, 4 days after the commencement of this action, the defendant for the first time learned that plaintiff had mortgaged and transferred the property, and he on that day, through his solicitor, gave the plaintiff's solicitors notice that he elected to treat the contract for sale as ended. He also gave notice that he intended to sue for the return of the portion of the purchase money paid thereunder. He now counterclaims for the return thereof with interest.

Plaintiff states that he transferred the property to his wife as trustee in order to protect the defendant, as he (plaintiff) expected an execution against him, his object being that when defendant paid the purchase money he could get his title. He also told her that he was transferring the property to her subject to his agreement with the defendant. Plaintiff's wife states that at the time of the transfer plaintiff told her that some one was doing something that was going to cause trouble, and that he was transferring the property to her in order that it would be secure for the defendant. It was shewn that there was no declaration of the trust in writing, but the property was transferred by her to the plaintiff, who became the registered owner thereof subject to the Loder mortgage on 16th April, 1908.

It is not disputed that plaintiff had either the title or the right to acquire the title at the time the agreement for sale was entered into, but it was concluded on the part of the defendant that he had the right to elect to treat the contract as at an end, first, because the plaintiff had subsequently incumbered the property, and secondly, because he had subsequently transferred it under circumstances which deprived him of the right to again obtain title from the transferee.

The fact that plaintiff has incumbered the property will not entitle the defendant to rescind the contract: see Armstrong v. Auger, 21 O. R. 98.

The grounds upon which defendant contends that plaintiff was not in a position to enforce a reconveyance from his wife, are, first, that the trust upon the part of his wife not having been declared in writing, is void under sec. 7 of the Statute of Frauds; and secondly, that the transfer was fraudulent, having been made for the purpose of defeating or delaying plaintiff's creditors.

In Davies v. Otty, 35 Beav. 208, property was transferred by the owner to another in anticipation of a prosecution and conviction for bigamy, and in order to prevent the forfeiture thereof to the Crown. After discovering that no proceedings would be taken against him, the owner brought the action to recover the property, and it was held that he was entitled to recover, and that the trust on the part of the grantee was one within the 9th section of the Statute of Frauds, and that statute could not be set up as a bar to the action.

That case appears to me to be "on all fours" with the present case, and is a strong authority against the defendant as to both of the grounds relied upon by him. A number of other authorities against him as to the second ground are cited in Godefroi on Trusts, 3rd ed., p. 193.

I hold that the defendant was not entitled, upon any of the grounds relied upon by him, to rescind his agreement with the plaintiff.

As the property is shewn to be incumbered for a sum greater than the balance of the purchase money due by the defendant, the plaintiff is not entitled to judgment for the payment to him of the purchase money now due. For the protection of the defendant I think I should follow the practice laid down in Armstrong v. Auger, and direct its payment into Court.

I find that the amount due by the defendant in respect of the third instalment is $1,549.26. The judgment will direct the payment by defendant of that amount into Court forthwith, pending a reference as to title, and that he pay plaintiff his costs of suit.

ALBERTA.

STUART, J. APRIL 23RD, 1908.

FULL COURT. JULY 24TH, 1908.

TRIAL.

FULL COURT.

TOLL v. CANADIAN PACIFIC R. W. CO.

Constitutional Law—Jury Ordinance, N. W. T., not in Force in Alberta—Alberta Act—Action under Fatal Accidents Act—Status of Infant Widow as Plaintiff—Grant of Letters of Administration to Infant Valid until Revoked—Infant Suing without Next Friend — Irregularity — Waiver—Railway—Injury to and Death of Engine-driver —Negligence—Post too Near Track—Evidence that Post since Removed—Admissibility — Judge's Charge — Evidence Establishing Negligence—Duty of Trial Judge to Submit Questions to Jury—Damages—Functions of Jury —Quantum of Damages—Pleading — "Not Guilty by Statute."

Action by the widow and administratrix of the estate of one Toll, deceased, to recover $15,000 damages for his death, alleged to have been caused by his head having come into contact with a post negligently placed too near the defendants' railway track, while the deceased, an engine-driver, had in the course of his employment his head thrust from the cab window of his engine.

The defendants pleaded "not guilty by statute" and contributory negligence by deceased, and specifically denied all allegations except that plaintiff was administratrix of the deceased.

The case was tried at Medicine Hat before STUART, J., and a jury. The jury found for the plaintiff for $4,500.

W. L. Walsh, K.C., and D. G. White, for plaintiff, moved for judgment on the findings.

R. B. Bennett, K.C., and H. A. Allison, for defendants, contended that the plaintiff had not proved that she was administratrix, and being an infant could not succeed in the

form of action brought, and further that negligence had not been proved against the defendants.

STUART, J.:—It seems to me that the exact point reserved was to some extent overlooked on the argument. It was forgotten that there was a trial by a jury, and that the issues of fact to be tried were sent to the jury for a verdict upon them. What were the issues upon the record? Certainly, as the record stood, the question whether or not the plaintiff was or was not the administratrix of the deceased was not in issue. This was admitted on the argument of the motion for judgment, though it was questioned by defendants' counsel at the trial. That question would, beyond doubt, be an issue of fact upon which the jury ought to return a verdict, although, of course, a grave matter of law was also involved, upon which I should have had to give the jury direction. The statement of defence does not deny specifically the allegation contained in paragraph 1 of the claim, viz., that the plaintiff is the administratrix of the deceased. It is true that the plea of "not guilty by statute" is on the record, but it is clear, I think, from the authorities, that this does not operate as a denial of the representative capacity of the plaintiff alleged in the statement of claim. For instance, in an action for seducing the plaintiff's servant, the plea "not guilty" does not deny the relationship of master and servant: Torrence v. Gibbons, 5 Q. B. 297; and in an action of crim. con. the plea does not put in issue the marriage: Chantler v. Lindsey, 16 L. J. Ex. 16; and in an action of slander of the plaintiff in his office or profession, the plea does not put in issue the fact of the plaintiff holding the office: Chitty's Precedents in Pleading, 2nd ed. (1847), pp. 639-653. Besides, English Marginal Rule 238 is in force here, and directly provides that the representative capacity of the plaintiff must be specifically denied.

Upon the record, therefore, as the case went to the jury, the representative capacity of the plaintiff, that is, the fact that she was the administratrix of the deceased, was admitted. Upon that point there was no issue for the jury to try. The defendants, it is true, moved for a nonsuit at the close of the plaintiff's case, but that could only be upon the issues as they went to the jury at the opening of the trial, of which the question of administration was not one. The plaintiff did not need to adduce any evidence as to her

position as administratrix, and I do not think the fact that the letters of administration were tendered and admitted in evidence makes any difference. These letters of administration referred only to something which was not in issue at all, and the plaintiff did not need to put them in. All this being so, how can I now deal with the question? No motion to amend the defence was made. The case went to the jury as the pleadings stood, and they were not asked to find any verdict as to the administration. The record still stands in that position. I surely cannot now allow an amendment and myself try the issue which would be raised by it. This appears to me to be of itself sufficient to shew that the mere fact that the plaintiff in her own evidence stated a circumstance which would raise some doubt as to the truth of an allegation made by her on the record and admitted by the defendants, cannot now be taken advantage of by the defendants, who neither got nor asked for leave to amend their defence by denying that allegation, in order to raise now an issue which the jury are no longer here to try.

It was also contended that, as the plaintiff is an infant, she can only sue by her next friend. But the statute, in my opinion, settles that question. Section 3 says that the action "shall be brought by and in the name of the executor or administrator of the person deceased." As the plaintiff is admitted on the record to be the administratrix, there was no other way to bring the action than by her and in her name.

The deputy clerk at Medicine Hat is therefore directed to enter judgment for the plaintiff for the sum of $4,500 and costs as of the date of the rendering of the verdict.

The defendants appealed.

The same counsel appeared.

The judgment of the Court (SIFTON, C.J., SCOTT, HARVEY, and BECK, JJ.), was delivered by

BECK, J.:—This is an action by an administratrix under C. O. 1898 ch. 48, intituled "An Ordinance respecting Compensation to the Families of Persons killed by Accidents." It was tried before Stuart, J., with a jury. The jury gave a verdict for the plaintiff with $4,500 damages, and judgment was directed to be entered accordingly. The

case is now before us on a motion to set aside the verdict and judgment and either to enter a judgment for the defendants or to direct a new trial.

A number of grounds were argued:—

1. At the opening of the case there was a challenge to the array, on the ground that C. O. 1898 ch. 28, intituled "An Ordinance respecting Juries," is in force, and the jury were not summoned in accordance therewith.

It might be sufficient, I suppose, to say that the appeal book, though containing the formal challenge and a note of the learned trial Judge's decision disallowing it, contains no notes of any evidence whatever with regard to the matter, so that we are left without any material by which to find the facts.

In my opinion, however, the Ordinance in question is not in force in this province.

Section 20 provides that the Ordinance shall come into force and take effect immediately from and after the repeal of secs. 71 and 88 of the North-West Territories Act. The Alberta Act (4 & 5 Edw. VII. ch. 3), whereby the province of Alberta was established, came into force by virtue of a provision contained in it, on 1st September, 1905.

Section 16 of that Act provides that "all laws . . . so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor . . . existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta . . . shall continue in the said province as if this Act . . . had not been passed; subject nevertheless (except, &c.), to be repealed, abolished, or altered by the Parliament of Canada or by the legislature of the said province according to the authority of the Parliament or of the said legislature. . . ." At the same session of Parliament the North-West Territories Act, 1905 (4 & 5 Edw. VII. ch. 27), was passed. It took effect also on 1st September, 1905. It did not expressly purport to repeal the North-West Territories Act, but excluded from the North-West Territories, and consequently from the operation of the Act, inter alia, "The Province of Alberta."

My opinion is that, quite independently of the latter Act, the effect of the Alberta Act was not to repeal the North-West Territories Act, but to cause the portion of the Territories comprised in the province to cease to be subject

to the provisions of the North-West Territories Act, proprio vigore, and to continue the law therein contained as a body of law which, having regard to the subject matter, was subject to the legislative jurisdiction of the Parliament of Canada or of the legislature of the Province, as the case might be, in the same manner as the common law and statutory law of England as it stood on 15th July, 1870, was introduced into the Territories.

By sec. 4 of R. S. C. 1906 ch. 1, it is provided that the several Acts enumerated in schedule A are and have been repealed on and from 31st January, 1907, to the extent mentioned in the schedule. The whole of the North-West Territories Act, R. S. C. 1886 ch. 50, is listed in the schedule.

It was argued that this was a repeal of secs. 71 and 88 so as to bring into operation the Jury Ordinance. There are two answers to this;—

(1) It was, by virtue of the Alberta Act, making applicable to the province as it did with some exceptions, the B. N. A. Act, beyond the powers of the Dominion Parliament to legislate with respect to procedure in civil cases.

(2) The North-West Territories Act, 1905, had already by implication amended the North-West Territories Act so as to cause it, at the time of its repeal, to have no application to the province of Alberta.

By 6 & 7 Edw. VII. ch. 44, the Parliament of Canada purported to amend the above mentioned schedule A by providing that the repeal of the North-West Territories Act should not apply to the province of Alberta, and that this provision should be deemed to have been in force on and since 31st January, 1907. The latter Act, of course, was of equal validity or invalidity to the former Act, so that neither can affect the question now under consideration.

For the reasons I have given, I am of opinion that the Jury Ordinance is not yet in force in this province.

2. It appeared during the course of the plaintiff's examination as a witness at the trial that she was under the age of 21 years, and counsel for the defendants contended that the letters of administration granted to her were consequently void, and that therefore she could not maintain the action. It is undoubtedly a rule of practice in England to refuse administration to an infant. This practice is based on the analogy to and the reason which led to the passing of sec. 6 of 38 Geo. III. ch. 87 (Imp.) prohibiting the grant of probate to infants under the age of 21 years.

In my opinion, the grant of letters of administration to an infant, though perhaps inexpedient, and admittedly contrary to the practice of the Court, is not void; they are at most irregular and therefore valid until set aside. I doubt even if letters probate granted to an infant would not also be merely voidable. Any other view might lead to great inconvenience and injury to innocent parties.

3. It was contended that, even though the grant of letters of administration was valid, still the plaintiff, being an infant, cannot maintain an action without a next friend. I do uot think the objection is one which, if valid, the Court was bound to give effect to. In Ex p. Brocklebank, 6 Ch. D. 359, it is said: "In the Court of Chancery a suit on behalf of an infant was brought in his name by a next friend in order to give security for the costs of the defendant, but, if the suit had been commenced without the intervention of a next friend, and the defendant chose to appear, I know of no reason why it should not have been prosecuted without a next friend. Probably, if in the present case an application had been made by the debtor in the first instance, that some adult person should be named for the purpose of giving security for the costs of the debtor's summons, the application would have been successful."

"The object of having a next friend is to give security for costs to the defendant. . . . The irregularity (of an infant plaintiff suing without a next friend) may be waived by the unconditional appearance of the defendant:" Annual Practice, 1908, p. 171, citing Ex p. Brocklebank.

The ground stated is wholly illusory, because the next friend is not bound to give security for costs, even though he be admittedly impecunious and a stranger.

No doubt, it cannot be said that the defendants in the present case knowingly did anything to waive the irregularity, if it was an irregularity. English O. XVI., Rule 16, provides that infants may sue as plaintiffs by their next friends in manner heretofore practised in the Chancery Division. I find no corresponding Rule under our Judicature Ordinance; but I assume the above Rule is in force here.

Assuming that there was an irregularity and that the obligation on the part of an infant to sue by a next friend is imposed by the above Rule, then it was under Rule 538 (English O. LXX., Rule 1) entirely within the discretion of the trial Judge as to what effect he should give to it. If the obligation was not imposed by the above quoted Rule.

but only by the practice of the Court, I think the Judge's power was the same. Smith v. Baker, 2 H. & H. 498, and Ferrand v. Mayor of Bradford, 8 DeG. M. & G. 93, are authorities shewing that prior to the Judicature Act and independently of any similar Rule to Rule 528, the Court has power to condone irregularities. There must in every case be some stage at which, quite independently of waiver, it must be too late to take advantage of, or to give effect to, a mere irregularity: see Millson v. Smale, 25 O. R. 144. The learned trial Judge did not deal with it as an irregularity. Had he thought an irregularity existed, I think he might, under the circumstances, have declined to give effect to it or have allowed the plaintiff an opportunity to amend by adding a next friend (Flight v. Bolland, 4 Russ. 298); and if this later course should be held to be necessary in order to save the action, I think this Court has power to authorize the amendment now and should exercise that power. I am, however, inclined to the opinion that no irregularity existed. Having held that the plaintiff was validly appointed administratrix, I think it must follow that, in so far as she acts in that capacity, she is freed from all disabilities arising from her infancy, and this notwithstanding the cases of Hindmarsh v. Southgate, 3 Russ. 324, and Stott v. Meanock, 31 L. J. Ch. 746, which, if they are to be followed, would indicate that there are nevertheless some limitations, not upon the rights but upon the liability of an infant executor or administrator.

4. At the trial objection was made to evidence as to what the defendants had subsequently to the accident done with respect to the post which it was alleged was the occasion of the accident. The objection was that such evidence was not admissible. The learned trial Judge admitted the evidence. The only English authorities appear to be the following:—

Bramwell, B., in Hart v. R. Co., 21 L. T. R. 263: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries) to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

Coleridge, L.C.J., in Beever v. Hanson, 25 L. J. Notes of Cases 132: "Now, a perfectly humane man naturally

makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against its being put forward as evidence of, negligence. A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shews that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

Both the learned Judges quoted were evidently referring to cases in which the evidence was in fact given and was consequently actually before the jury. I think the correct view is that in an action for negligence, evidence of repairs, improvements, removal, substitution, or the like, done after the occurrence of an injury, is, if it stand entirely alone, no evidence of negligence, but that such evidence is admissible because it is logically relevant. It may in any case, and does in fact in most cases, become the logical foundation for evidence of other admittedly relevant facts arising out of it, such as declarations made at the time or the consequent disclosure of the more or less latent condition of the object which occasioned the accident. In most cases it would be almost impossible in practice to exclude evidence of the fact. I think that though standing alone such evidence would not afford evidence in which a jury could reasonably find negligence, yet it is a circumstance which, in connection with other evidence, they have a right to consider. If there was no other evidence relevant to the question of negligence, it would of course be the duty of the trial Judge to withdraw the case from the jury. If there was additional evidence, it would be the duty of the trial Judge to warn the jury that evidence of subsequent repairs, improvements, removal, substitution, or the like, taken by itself, is no evidence of negligence. I think, therefore, the evidence objected to was properly admitted.

In his charge to the jury the learned trial Judge said: "There are just one or two things, possibly—observations that I might make in regard, for instance, to the bearing of the evidence about the removal of the post afterwards. That is taken by the plaintiff's counsel as an admission on

the part of the defendants that the existence of that post, in the place it was, was a source of danger, and that it was negligence on their part to have it there, and that it was the existence of that post in the place in which it was that caused Toll's death. Just how far you can make that deduction from what the defendants did is a matter of very grave question, in my mind. It would immediately occur to any one that that might possibly be the reason of his death, and I do not know that you are entitled to draw any stronger inference from this than that the defendants removed it, and they were going to see that, if it had caused that man's death, it should not cause any one else's death."

It seems to me that this constituted a sufficient warning to the jury.

5. It was submitted by counsel for the defendants that there was no evidence of negligence. In my opinion there was.

The accident occurred at a siding on the defendants' main line at a place called Bantry.

The deceased left Medicine Hat in charge as engine-driver of engine No. 1134, drawing a train consisting of a water car, 3 box cars, 30 flat cars, and a caboose. This was an extra train bound westward for the gravel pit at Crowfoot, near Bantry siding, which lies between Medicine Hat and Crowfoot. The fireman McColl, who was on the deck of the engine, heard the door on the right side of the cab of the engine violently slam to and some of the glass in it breaking. Looking in, he saw the deceased lying on the floor of the cab with his head and shoulders against the door. McColl, being unable to open the door because the deceased's body was against it, crawled through the opening made by the broken glass in the top of it and stopped the engine. He examined the deceased and found him unconscious and bleeding at the right ear and matter running out of his nose. He was taken on to Brooks, the next station, and from there carried back to Medicine Hat, where he died the next day. The post-mortem examination disclosed the fact that there was a large bruise over the left ear and an operative wound, that there were some pieces of bone missing above the left ear; that there were 3 fractures of the skull and a laceration of the brain. The medical witness who made the post-mortem examination gave as his opinion that the deceased's

death was due to hæmorrhage from branches of the middle cerebral artery caused by some hard object coming into contact with the head, or the head coming into contact with some hard object. I think there is no room for doubt upon the evidence that this hard object was a ledgerwood post planted by the defendants a week before the accident between the main line of the railway and the siding at Bantry, which runs for about 2,500 feet parallel with and at a distance of 9 feet north of the main line. This post was a foot thick and from 14 to 16 feet above the ground, which made it higher than the cab of a locomotive. On the afternoon of 11th June, the day following the accident, Cassidy, a conductor in the defendants' employ, acting under the instructions of the railway superintendent of the division, stopped the engine of his train opposite this post and made measurements to it from the cab window, which established the fact that the distance between the window and this post was 22½ inches, the engine being of the same type as No. 1134.

The blow that the deceased received was, it is clear, dealt to him between the mile posts placed upon the main line east and west of Bantry siding. At the east mile post he was uninjured, for he blew the whistle of his engine there and the train was stopped, after his injuries were sustained, at the west mile post. There was no obstacle between these mile posts by which he could have been struck except the ledgerwood post. There was nothing, so far as one can judge, in the inside of the cab that would have inflicted these injuries. The deceased had been wearing a cap, but it was not found on his head or in the cab after he was hurt. The cab projected over the rail for over two feet, and the running board from the cab to the pilot projected over the rail two feet at its narrowest point. The deceased had been leaning out of the window shortly before this, and the evidence shews that in the discharge of his duty it would be proper for him to extend his body a considerable distance out of the window to inspect the injector under the cab, which it was shewn was not working properly, and that if he did so his body would be projected out of the window for more than two feet.

I think this resumé of the facts shews that it would have been improper for the trial Judge to withdraw the case from the jury, and that their verdict cannot be dis-

turbed on the ground of there being no evidence to support it.

6. Counsel for the defendants submitted that it was the duty of the trial Judge to have acceded to his (counsel's) request that questions be submitted to the jury. He cited Pritchard v. Lang, 5 Times L. R. 639; Mader v. Halifax Electric Tramways Co., 37 S. C. R. 98. It is clear, however, that there is no obligation on the part of the Judge to do so; that is wholly in his discretion; but that some eminent Judges deem it expedient to do so in an action of negligence. It is clear, too, that in this jurisdiction a jury is not bound to answer questions; the submitting to them of questions is in effect asking them to give a special verdict; they are undoubtedly at liberty nevertheless to render a general verdict.

7. Counsel for the defendants further contended that the damages should have been assessed not by the jury but by the Judge, inasmuch as the Ordinance in question says, "The Court may give such damages," &c. It seems to me that "the Court" in this case means the tribunal, whether consisting of a Judge alone or a Judge and a jury, before whom the action is tried. At all events the Judge did, by his judgment founded upon the jury's verdict, give the damages which the jury estimated, and which, it may be presumed, were in agreement with his own opinion. It is true that as a further ground of appeal it was contended that the damages were excessive, but, though this ground was also adverted to in the appellants' factum, it was not pressed in argument, and it seems to me the contention could not be seriously made, especially in view of the decision of this Court in Hansom v. Canadian Pacific R. W. Co. (not yet reported except on another ground in 40 S. C. R. 194), where, against the objection that the damages, $6,500, for the loss of a foot by a man in much the same station in life, were excessive, the Court sustained the verdict.

In my opinion, therefore, the appeal should be dismissed with costs.

ALBERTA.

JULY 24TH, 1908.

FULL COURT.

CANADIAN PACIFIC R. W. CO. v. MEADOWS.

Vendor and Purchaser—Contract for Sale of Land—Purchase Money Payable by Instalments—Default by Purchaser after some Payments Made—Action to Recover Subsequent Instalments—Motion for Judgment—Remedy on Default of Payment—Rescission — Forfeiture — Relief against—Judicature Ordinance—Specific Performance—Sale of Land—Possession—Form of Judgment.

Action by vendors to recover instalments of purchase money overdue under a contract by defendant for the purchase of land, and in default for rescission, forfeiture of the moneys paid by the purchaser, and other relief.

The plaintiffs moved for judgment upon the statement of claim, in default of appearance and defence, and the motion was referred by BECK, J., to the full Court.

The motion was heard by SIFTON, C.J., SCOTT, HARVEY, BECK, and STUART, JJ.

R. B. Bennett, K.C., for plaintiffs.

J. C. F. Bown, K.C., for defendant.

SCOTT, J.:—This is a reference by my brother Beck for the opinion of the Court en banc.

This is a vendors' action under an agreement for the sale of land. Plaintiffs allege that the agreement provides that time shall be of the essence of the contract, and that, in default of payment of the purchase money, the agreement may be cancelled without any right on the part of the defendant to any reclamation or compensation for moneys paid thereunder, and that default has been made in payment of certain instalments of the purchase money. The relief sought by the statement of claim is payment of the overdue instalments of purchase money and interest, or, in default of such payment, a declaration that the payments already made be forfeited and the agreement rescinded, possession, directions, and costs.

The plaintiffs are now applying for judgment by default of appearance, and claim to be entitled to judgment for the overdue instalments, with interest up to 3 months from the date of the payment and costs of suit, and that, in default of payment thereof within that period, the agreement be declared cancelled and the payments made thereunder forfeited, that the defendant deliver up possession, and that the estate and interest of defendant in the lands be foreclosed.

My brother Beck, to whom the application was made, refused, for reasons stated by him, to order rescission of the agreement, but offered to give judgment declaring plaintiffs entitled to specific performance of the agreement, and that, in default of payment of the overdue instalments and interest within the time limited, the lands should be sold, and stated that if plaintiffs were unwilling to accept a judgment to that effect, he would refer the application to the Court en banc.

It is now contended on behalf of the plaintiffs that they are entitled to the judgment applied for.

It appears to be open to doubt whether in England a vendor is entitled to institute an action solely for the cancellation of a contract for sale, on the ground that the purchaser has made default in the payment of the purchase money. I cannot find any English authority which supports the view that such an action would be maintainable.

It has been held in Manitoba that it would, but in Hudson's Bay Co. v. Macdonald, 4 Man. L. R. 237, Killam, J., bases his judgment to that effect upon a dictum of Jessel, M.R., in his judgment in Lysaght v. Edwards, 2 Ch. D. 506. Upon referring to that judgment, I find it is merely to the effect that a vendor is entitled to that relief upon a judgment in an action for specific performance, which is the usual form of an action by a vendor seeking equitable relief. In such an action, if the vendor is found entitled to have the agreement specifically performed, an order is made for the payment of arrears within a specified time. If payment be not made within that time, the vendor may then apply for, and he appears to be entitled to obtain, an order for the rescission of the contract.

The question whether a vendor is entitled to maintain an action merely for rescission or cancellation on the ground of non-payment of the purchase money does not appear to me to be material, as I agree with my brother Beck in the

conclusion that he has arrived at, that in such a form of action the vendor may be accorded the same relief as if his action were one for specific performance, and that, if he is ultimately entitled to rescission in case of default in payment within the time limited by the judgment, I see no reason why the judgment should not in the first instance declare that he is entitled to that relief in case of such default.

I have shewn that in England a vendor appears to be entitled as of right to an order for rescission in case of default in payment within the time limited by the judgment. The question also arises whether he is also entitled to it here. I think he would be so entitled were it not for the provisions of sub-sec. 8 added to sec. 8 of the Judicature Ordinance by sec. 7 of ch. 5 of 1907, which gives to the Court here power to relieve against all penalties and forfeitures. The rescission of a contract of sale for non-payment of the purchase money will in some cases, if not in all, constitute a forfeiture of the purchaser's interest in the land, and I see no reason why the Courts here should not, under the sub-section referred to, relieve against it in cases where the circumstances justify such relief.

It was contended on behalf of plaintiffs that, as the defendant had not appeared, the Court should not be astute to discover or grant him any relief which he has not claimed.

In my view the effect of a defendant not appearing is that he leaves it to the Court to grant to the plaintiff only such relief as, under the circumstances of the case, he is reasonably entitled to. Upon an application to a Judge for judgment in default of appearance in an action such as this, he may not consider it his duty, but it is certainly within his province, to inquire into the circumstances relating to the subject matter of the action, and the interests of the parties therein, and to take those matters into consideration in determining the form and effect of the judgment to which the plaintiff is entitled.

In cases where a vendor is found entitled to a judgment for rescission of the contract, and elects to take judgment therefor, he is not entitled as well to a judgment for damages for breach of the agreement: Henty v. Schroder, 12 Ch. D. 666. It is not by any means clear that he is entitled to a judgment declaring that payments made by him either on account of the purchase money or by way of deposit are forfeited: Griffiths v. Vesey, [1906] 1 Ch. 706; Hutchison

v. Humphreys, 54 L. J. Ch. 650. In fact it appears to be open to question whether, upon a judgment for rescission, the purchaser is not entitled to recover from the vendor any moneys paid on either account: see Clark v. Wallis, 35 Beav. 460; Griffiths v. Vesey (supra); Barton v. Capewell Continental Co., 68 L. T. R. 857; Jackson v. DeKadich, 48 Sol. J. 687; Macreth v. Marlar, 29 Eng. Rep. 1156.

It is unnecessary upon this reference to consider the effect of the provision in the agreement which authorizes the plaintiffs in case of defendant's default to cancel the agreement and forfeit the moneys paid on account of the purchase money. I therefore refrain from expressing any opinion upon it.

For the reasons I have stated, I am of opinion that it was within the discretion of my brother Beck to give the judgment he proposed to give and to refuse to rescind the agreement.

SIFTON, C.J., HARVEY and BECK, JJ., concurred.

STUART, J. (dissenting):—I think it is quite clear that a suit by a vendor upon an agreement for sale to recover intermediate instalments of the purchase money should in general be treated as an action for specific performance. Where a difficulty as to title arises, which is not the case here, it is true that there may be some trouble as to the proper form of the order, but we are not concerned with that question now. Counsel for the plaintiffs, while not distinctly admitting that such an action ought in every case to be so treated, practically acquiesced in such a course being taken in the present instance, and consented that a day should be named upon or before which the defendant must pay the arrears of the purchase money. It was with respect to the rights which would accrue to the plaintiffs in case the defendant should fail to pay by the day named that the whole argument before us was concerned. The plaintiffs contended that they would in such event have an absolute right to a declaration that the contract be rescinded, and that there would be no discretion in the Court to deny this right and force a sale in lieu thereof.

In the first place I cannot bring my mind to assent to the proposition that this question is a mere question of practice. The mere statement of the question argued is

surely in itself sufficient to shew that it cannot be looked upon as a question of practice. The question whether or not a party to an agreement has in a certain event acquired a right to declaration by the Court that the contract is rescinded, is surely a question of his substantive rights, a grave question of the general law of contracts, and not a mere question of procedure which may vary in different jurisdictions and according to the discretion of different Courts.

After a careful examination of the cases, I am of opinion that under the law of England a vendor has a right, if not in the first instance, at any rate upon failure of the purchaser to comply with an order for payment made in a suit for specific performance, to ask for an order that the contract be rescinded. It seems to me that no other conclusion can be drawn from the numerous cases in which a plaintiff vendor asked for such an order and at once received it without question except as to terms, than the conclusion that he was clearly entitled to it. The fact that this right was never, so far as I can find, discussed or questioned, shews conclusively, I think, that it did, and in England at least does, still exist.

The only question, therefore, is whether anything has been enacted here in this province which has changed the law.

It is said that because the legislature of Alberta by statute 7 Edw. VII. ch. 5, sec. 7, sub-sec. 2 (8), enacted that, "Subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation, and all other matters as the Court sees fit," therefore this Court has power to do something in this case which the Courts of England never had power to do. I am sorry to say that I find myself unable to assent to this proposition. It is true that no such provision is contained in the English Judicature Acts, and it is therefore probably also true that this Court may be able to relieve against a forfeiture in cases in which the Courts of England have never yet assumed to exercise that power, but, however that may be, I am of opinion that the Courts of equity in England, long before the Judicature Act, did exercise the power of relieving against forfeitures incurred through non-payment of money.

In Reynolds v. Pitt, 19 Ves. Jr. 134, 34 Eng. Rep. 468, Lord Eldon, Lord Chancellor, said: "The origin of the doctrine is to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time; this Court holding that by the payment of interest the party was put in just the same state as if the principal had been paid at the time stipulated."

Indeed I cannot understand what else the Court of equity were doing when they granted specific performance of an open contract for the sale of land at the suit of the purchaser, who was a few days late in payment of the purchase money, where time was not of the essence of the contract, than relieving against a forfeiture.

At law the money had to be paid on the day named, but, as long as the purchaser came in in a reasonable time, and was not guilty of laches, he could get specific performance if he went into equity.

In granting specific performance at the suit of the vendor, the Courts always fixed a day for the payment of the money, necessarily much later than the date fixed in the agreement, and there are numerous cases where, although the purchaser did not pay on that day, a new day was given. Surely this is relieving against a forfeiture.

Moreover, such a course is, in my view, the only thing that can in strictness be called relieving against a forfeiture; I mean the course of preserving by postponement after postponement the rights of the purchaser under the agreement. What, it must be asked, is the right of the purchaser under the agreement which the Court will endeavour as long as possible to preserve from destruction? The right is simply to have a conveyance of the land upon payment of the purchase money. The Court, I grant, will struggle to preserve that right for the purchaser as long as it possibly can, and does so by naming new days for the payment. But if the purchaser will not or cannot pay, there comes a time when it is impossible to preserve his rights, simply because he is, in the last resort, the only one who can preserve them and that only by exercising them.

The purchaser who has paid some money under an agreement of sale has, as I conceive it, two interests: first, an interest in the property to the extent of the money paid; second, a right to receive a title when he pays the balance.

I agree that the Court may and ought, with certain limitations presently to be mentioned, to preserve the first from forfeiture. I agree also that it will as long as possible preserve the second right by postponements of the day for completion, but I cannot agree that when the Court lays its own hands upon the property and orders a sale, calling in a new purchaser and forcing a new agreement, it is thereby merely preserving from destruction the purchaser's rights under the agreement, which, as I have said, are merely that he may pay the purchase money and receive a title. This latter alone can, in my view, be called a relief from forfeiture. By ordering a sale the Court gives the purchaser something vastly different from his rights under the agreement. Instead of preserving his right to pay the purchase money and get a title, it allows a new party to pay, not the purchase money, but other purchase money under a new agreement, and to get a title, and it gives the original purchaser not his rights under the agreement but the proceeds of the sale.

By ordering a sale the Court is not relieving against a forfeiture; it is actually enforcing one. Once the property is sold under a decree, the purchaser's right to get that property upon payment of money is forever gone, and, instead, he may have a judgment against him enforceable by execution if there happens to be a balance still due after the application of the proceeds. This only makes it clearer that it is impossible in the nature of things to avoid a forfeiture in the long run if the purchaser will not or cannot exercise his rights by payment. In my view, it is no answer to say that the Court gives him or preserves him his rights by giving him the benefit of the proceeds of the sale. The purchaser has, as I have said, a pecuniary interest in the property to the extent of payments made. He has no pecuniary interest beyond that; he has simply a right to get the title if he pays the balance. That is a different thing altogether, in my view, from a pecuniary interest in the property over and above the amounts paid, and it is this non-existent pecuniary interest that the Court gives him when it hands over to him or to his benefit the proceeds of the sale beyond what he has paid.

It may be said that this is really irrelevant as being rather a reason why the discretion should not be exercised in a particular way than as a proof that the discretion does not exist at all. The real point is, however, in my view,

that the question to be decided is shifted. It becomes really a question whether, when a forfeiture must be enforced in some form, the Court has a discretion to say which of two possible forms it will take, whether that of rescission or that of sale. This being so, the power of the Court, whatever power it has, cannot rest upon its equitable jurisdiction to relieve from a forfeiture, because the circumstances are such that it cannot do that in any case. The power to order rescission is perhaps discretionary as being an exercise of the equitable jurisdiction of the Court. If rescission is refused, in my view the vendor is driven back to his rights at law. I cannot bring my mind to assent to the proposition that when an owner of property agrees to part with it, on condition of being paid some money by a particular person, if that person cannot or will not perform the condition, the Court has still a right or power to force the vendor to part with it anyway.

It is true, I agree, that the Court will relieve against the forfeiture in the proper sense of those terms, but, in my view, there comes a time when if the purchaser after repeated acts of grace on the part of the Court in granting further time for the exercise of his rights cannot or will not, I think it makes no difference which, exercise those rights, then the vendor has a right to say that no more grace shall be given, and has a right to ask that the contract be declared at an end. All the orders for rescission which have been made in England in suits by the vendor for specific performance, after repeated defaults by the purchaser, have, in my view, been made when the Courts had just as large powers at least upon this question to relieve against forfeitures as we now have; and, as the right of the vendor to ask for rescission was never questioned, I think it is still the law that he has the right here in this province, after the Court has given the purchaser ample time for payment and after default is again made, to ask that such an order be then made.

For reasons I have given, I think there may be discretion to refuse rescission, but no discretion to order a sale if the vendor refuses. If rescission is refused, the vendor may do what he might have done anyway out of the Court, declare rescission, and, if the purchaser is in possession, sue for ejectment. The purchaser may counterclaim for specific performance, which may be granted or refused; if granted, we arrive at the same position by a

different route; but, I think, if payment is not made by the day named, there must then be either rescission or at least ejectment, which will serve the vendor as well.

A good deal was said about the relationship of trustee and cestui que trust and mortgagor and mortgagee. It seems to me that those expressions have in reality been used in speaking of vendors and purchasers merely in an illustrative sense. The purchaser, it is said, is a trustee for the vendor for the balance of the purchase money. Could he be proceeded against for embezzling it? The question contains the answer. The Court of Chancery in England is, I think, as keen to discover the relationship of trustee and cestui que trust as any Court in the world, and I have failed to discover any case in which that Court has applied the principles of that relationship in the way it was suggested that they might be applied here. The same remarks apply to the suggestion about the relationship of mortgagor and mortgagee.

I am, however, of opinion that in making such an order the principle to be adopted is to restore the parties as far as possible to their antecedent position, the principle of restitutio in integrum. See Cyc. of Procedure and Practice, vol. 16, p. 80; Am. & Eng. Encyc. of Law, 2nd ed., vol. 24, p. 620; Williams on Vendors and Purchasers, p. 951.

It would clearly be a forfeiture if the plaintiffs were allowed to retain all payments made by the defendant. I think the proper course is indicated in a general way by Romilly, M.R., in Clark v. Wallis, 35 Beav. 460. There should be a reference to the clerk to fix the amount due to the plaintiff for principal, interest, and costs, and to fix a day for payment not less than (say) one month from the date of the certificate, though the exact time should of course be in the discretion of the Judge in each case, and upon non-payment I think the plaintiffs would be entitled to an order for rescission, but such order should be accompanied by a reference to the clerk to ascertain the amounts paid to the plaintiffs on account of the purchase money, and to ascertain the rental value of the premises during the time the defendant has been in possession, to add this amount to the costs of the plaintiffs, and deduct the total from the amounts paid to the plaintiffs on the purchase money, and, upon payment of the balance, if any, into Court, the plaintiffs should have the order for rescission and for possession. If the amount of the costs and

rental value exceed the amounts paid on the purchase money, the plaintiffs should have, in addition to the order for rescission and possession, judgment against the defendant for the balance. I think, also, the Judge making the order of reference might, in his discretion, direct the clerk to allow the defendant interest at the legal rate on the moneys paid, and that in case the balance is in favour of the defendant, he should be declared to have a lien on the land to secure the payment of this balance by the vendor.

All of these conditions should be to a large extent in the discretion of the Judge making the order for rescission.

ALBERTA.

JULY 24TH, 1908.

FULL COURT.

WINTERBURN FARM CO. v. EDMONTON, YUKON, AND PACIFIC R. W. CO.

Railway—Duty of Railway Company to Fence—Breach of Statutory Duty—Railway Act, 1903, secs. 199, 294—Railway Act, R. S. C. 1906 ch. 37, secs. 254, 427—Right to Damages—Fence Ordinance—Pleading—"Not Guilty by Statute."

Appeal by defendants the Edmonton, Yukon, and Pacific R. W. Co. from the judgment of HARVEY, J., upon the findings of a jury, in favour of plaintiffs for the recovery of $1,202.50 against the appellants in an action for damages for breaking down plaintiffs' fences, failing to fence the railway of the appellants, and for damage done by cattle getting from the railway right of way upon the plaintiffs' land.

The appeal was heard by SIFTON, C.J., SCOTT, BECK, and STUART, JJ.

O. M. Biggar, for appellants.

G. B. O'Connor, for plaintiffs.

BECK, J.:—Judgment was entered on the trial of this action by Mr. Justice Harvey upon the verdict of the jury

for $1,202.50 and costs against the defendants the Edmonton, Yukon, and Pacific Railway Company, the action being dismissed as against the other defendants. The action was to recover damages arising by reason of the defendants, in the course of the construction of the railway, breaking down the plaintiffs' fences and omitting to fulfil their statutory duty to erect fences on each side of their railway where it intersected the plaintiffs' land, in consequence whereof straying cattle passed from the railway right of way on to the plaintiffs' land. The case went to the jury and was considered by the learned trial Judge, evidently without objection on either side, solely as grounded upon the defendants' breach of their statutory duty. The damages were sustained during the autumn of 1906 and the spring of 1907. The question of the liability of these defendants depends upon the meaning of sec. 199 of the Railway Act of 1903 (3 Edw. VII. ch. 58), which in the Railway Act, R. S. C. 1906 ch. 37, which came into effect on 31st January, 1907, has become sec. 254. The difference between the wording of the two sections is not of importance in considering the present case. Section 199 of the Act of 1903 is as follows: "The company shall erect and maintain upon the railway fences, gates, and cattle-guards, as follows:

"(a) Fences of a minimum height of 4 feet 6 inches on each side of the railway.

"(b) Swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings, at farm crossings; provided that sliding or hurdle gates, already constructed, may be maintained.

"(c) Cattle-guards, on each side of the highway, at every highway crossing at rail-level by the railway. The railway fences at every such crossing shall be turned into the respective cattle-guards on each side of the highway.

"2. Such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

"3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, gates, and cattle-guards, unless the Board otherwise orders or directs."

Section 294 of the Act of 1903, which has become sec. 427 of the R. S. C. of 1906, is as follows: "The company,

or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by the company, doing, causing, or permitting to be done, any matter, act, or thing contrary to the provisions of this or the special Act, or to the orders or directions of the Governor in council, or of the Board or Minister made hereunder, or omitting to do any matter, act, or thing required to be done on the part of any such company, or person, is liable to any person injured thereby for the full amount of damages sustained by such act or omission; and if no other penalty is, in this or the special Act, provided for any such act or omission, is liable, for each offence, to a penalty of not less than $20, and not more than $5,000, in the discretion of the Court before which the same is recoverable."

I think the law is that where a statutory duty is imposed, the neglect by the party upon whom the duty is imposed to fulfil the duty gives a right of action to any party sustaining damage in consequence of the breach of the statutory duty, unless the terms of the enactment are such as clearly indicate that the statutory duty is imposed only for the benefit of a class of persons of which the plaintiff is not one, or only to avoid certain consequences in which those complained of are not included. The cases were discussed at length during the course of the argument, and a number of them are annotated and noted in 19 R. C. pp. 42 et seq.

It was contended on behalf of the appellants (the Edmonton, Yukon, and Pacific Railway Company) that the enactment now under consideration does disclose that its intention was that the fences, the duty of constructing which is imposed upon the railway company, are for the purpose of preventing animals getting upon the railway right of way and being injured thereon, and not for the purpose of preventing them passing from the railway right of way on to the lands of adjoining owners and doing damage thereon. This contention was based principally upon the history of the legislation with reference to fences, commencing with the C. S. C. 1859 ch. 66, and decisions upon the Acts preceding the Act of 1903.

In my opinion, the differences between the provisions with regard to fences as they stand in the Act of 1903 and the earlier provisions with regard to the same matter are such as to make the decisions upon the earlier provisions

inapplicable to the present provisions. I can find no intention disclosed in sec. 199 that the fences required to be erected are not intended for all purposes which they may serve. If, therefore, the section stood alone, I should so hold, but the correctness of this view is, it seems to me, put beyond question by the provisions of sec. 294 of the Act of 1903 already quoted. Its terms are quite general: "The company . . omitting to do any matter, act or thing required to be done on the part of any such company . . . is liable to any person injured thereby for the full amount of damages sustained by such . . . omission."

This view is supported by Levesque v. New Brunswick R. W. Co., 29 N. B. R. 588, and Lizotte v. Temiscouata R. W. Co., 3 N. B. R. 397.

The opinion I have expressed is that of the learned trial Judge merely put in different form. I think, therefore, the appeal should be dismissed with costs.

SIFTON, C.J., and SCOTT, J., concurred.

STUART, J.:—It was urged on behalf of the respondents that the appellants were not entitled to rely in any way upon the provisions of the Fence Ordinance, because that Ordinance had not been specially pleaded. In answer to this the appellants contended that having pleaded "not guilty by statute" they were entitled to set up any defence which might be available to them under that Ordinance. The effect of this plea has not, so far as I have been able to discover, been considered either by this Court or by the previously existing Territorial Court, and it may be advisable to say something, not in the hope of clearing the whole point up, which would be very difficult, but rather perhaps to shew in how unsatisfactory a condition, at least in my view, the whole matter stands. At the outset I am very glad to have this opportunity of saying that on a closer examination of the matter it has become fairly clear to me that I perhaps went astray in the decision I gave in the case of Toll v. Canadian Pacific R. W. Co., ante 795, which has been reviewed by the other members of this Court. It is clear that at common law a defendant by pleading the general issue, which, in an action on the case for a tort, took the form of a plea of "not guilty," could raise by his

evidence almost any kind of a defence, including even matter which ordinarily would have to be pleaded as matter of confession and avoidance. After a more careful examination of such authorities as are available here, I have been unable to discover the exact extent of the limitation implied in the word "almost," which is continually used, as I have just used it, in referring to the character of the defences allowable under the plea in question.

By Rule of Court of Hilary Term, 4 Wm. IV., it was ordered that in actions on the case the plea of "not guilty" should operate only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and that no other defence than such denial should be admissible under that plea. This Rule was made, however, in pursuance of the Act 3 & 4 Wm. IV. ch. 42, sec. 1, which provided that no such Rule or Order should have the effect of depriving any person of the power of pleading the general issue and of giving the special matter in evidence in any case wherein he then was or thereafter should be entitled so to do by virtue of any Act of Parliament then or thereafter to be in force: see Haine v. Davey, 10 L. J. Q. B. 167. In Williams v. Jones, 11 A. & T. 643, quoted in Mason v. Mossop, 29 U. C. R. 505, Lord Denman, C.J., said: "I thought that the plea put in issue nothing but the defence which the statute gave, and had not the effect of an ordinary plea of 'not guilty.' But that construction has since been held erroneous."

In Maund v. Monmouthshire Canal Co., 1 Car. & M. at p. 33, Cresswell, J., said: "My brother Patteson informs me that 14 Judges had a meeting to settle the question as to what could be given in evidence under the plea of 'not guilty by statute,' and he tells me that the majority of the Judges were of opinion that every defence that could be specially pleaded, whether founded entirely on the statute or partly on the statute and partly not, or if it was a defence wholly independent of the statute, may be given in evidence under the plea of 'not guilty by statute.'"

These decisions apparently settled the practice, and in Toll v. Canadian Pacific R. W. Co. I was possibly led astray by a chapter in Chitty on Pleading published in 1847, before the Common Law Procedure Act, which on the face of it appears to be dealing with the old common law plea of "not guilty," which was originally as wide as the later

plea of "not guilty by statute" continued to be, and makes no reference to the limitation of the common law plea by the Rules of 1834.

It was in 1836 that a Rule was passed providing that where a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert the words "by statute" in the margin of such plea. And again in 1853 this Rule was enlarged so as to provide that the particular Act and section thereof, and whether the Act was public or otherwise, should also be inserted in the margin. At the same time, I would gather, for the Rule appears in Upper Canada in 1856, that a Rule was made that "nothing in these Rules shall affect the right of any defendant to plead 'not guilty by statute,' and every such defence of 'not guilty by statute' shall have the same effect as a plea of 'not guilty by statute' has heretofore had, but, if the defendant so plead, he shall not plead any other defence without the leave of the Court or a Judge." These Rules now appear as Order 19, Rule 12, and Order 21, Rule 19, of the English Rules of 1883, and the former appears as our Rule 113, while the latter is in force here of course by virtue of sec. 21 of the Judicature Ordinance.

Now, it is at first sight difficult to understand why it was thought necessary to provide that a defendant who pleads "not guilty by statute" should not plead any other plea except by leave, for it was plain that if the plea had the effect of the old common law plea of the general issue, there never would, at least in any case which can at this date be imagined, be any need of pleading specially. It will appear, however, from an examination of such cases as Ross v. Clifton, 11 A. & E. 631, Legge v. Lloyd, 10 L. J. C. P. 19, Heale v. McKenzie, 3 L. J. Ex. 228, that defendants were attempting to plead "not guilty," by virtue of the liberty given by some statute so to do, and to add special pleas also, and that the Courts found it necessary to discourage the practice, and it was, no doubt, as a further discouragement that the direct Rule was made in 1853. Speaking for myself I am bound to say that I shall hereafter incline very strongly towards the views adopted by the Courts in the cases I have cited, and to refuse such leave when it is applied for, because, while it may be said that a defendant is only desiring to put the plaintiff on his guard by pleading specially, it really may work out in

practice just in the opposite direction by "drawing a red herring across the plaintiff's track," to use a popular expression, and inducing him to believe that the special plea is that upon which the plaintiff really intends to rely, whereas something altogether different may be put forward at the trial under the general issue, as was in fact done in this case with which I am now dealing.

Assuming, however, that the defendants here were permitted under the plea of "not guilty by statute" to raise this defence under the Fence Ordinance, it is not quite clear that they were entitled in any case to plead "not guilty by statute." In most of the old statutes which gave liberty to plead this remarkable plea, it will be noticed that the words are generally to this effect: "In any action brought for anything done in pursuance of this Act the company may plead the general issue and give the special matter in evidence," etc., etc. There are authorities such as March v. Port Dover and Otterville Road Co., 15 U. C. R. 138, which shew that where the statute allowing the plea is couched in these words, the action must be for something done, and not for an omission, for a misfeasance and not for a nonfeasance, before the plea of "not guilty by statute" is allowable at all. The section of our Railway Act, ch. 37 of the Revised Statutes, allowing the plea, is drawn in much more general terms.

Section 306, sub-sec. 1, says: "All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year," &c.; and sub-sec. 2 says: "In any such action or suit, the defendant may plead the general issue," &c.

Now, if the damages had been alleged by the plaintiff to have been suffered solely by reason of the failure of the defendants to put up the line fence, it could not possibly have been said that the damages alleged were suffered by reason either of the construction or of the operation of the railway. It would be a mere nonfeasance, and, under the authorities I have referred to, the right to plead "not guilty by statute" would apparently not arise at all. On the other hand, it is to be observed that the plaintiffs allege both an actual breaking of the plaintiffs' fences and an omission to build the line fence, and in paragraph 6 the damage is alleged to have arisen "by reason of the breaking down of the fences aforesaid and the omission aforesaid

to erect fences," &c. It is clear that in answer to the charge of breaking down the fences the defendants would be entitled to plead "not guilty by statute," and whether the pleas of "not guilty by statute" and any other defence made available by this plea should not be confined strictly to the charge of breaking down the fences, might be a grave question to decide. If the plea and the consequently available defence were so confined, there might be a further grave question to decide as to whether, in view of the turn the case took at the trial, the defendants should now be given any rights under that plea. There is a further lesser question as to the form of the plea itself. The Rule is clear that the Act relied upon must be noted in the margin. So far as the Railway Act is concerned, it will be observed that, instead of noting this in the margin, the defendants have referred to it in a separate paragraph of the defence. It seems to be the rule that the statute allowing the plea as well as the special Act relied upon as permitting the act complained of, must both be noted in the margin: see Van Natter v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 587. But it is also decided that, even after verdict, on motion for judgment or a new trial, the Court will permit the defendant to add the necessary note in the margin: see Edwards v. Hodges, 15 C. B. at p. 491.

I have said this much about the plea of "not guilty by statute" in order to shew how much difficulty is likely to arise from the continuance of this antiquated plea as part of our practice and as a reason for expressing my own personal hope that it may soon disappear.

I prefer not to express any final opinion as to whether or not the defence arising in this case from the terms of the Fence Ordinance is open to the defendants under the plea of "not guilty by statute," chiefly because, as I have said, it is difficult to discover at this late date the exact limitation attached several hundred years ago to the old common law plea which certain statutes have preserved apparently for a very limited class of defendants.

Upon the merits of the appeal, even admitting the right of the defendants to raise this defence, I have come to the conclusion, though with some hesitation, that the appellants must fail. If the Railway Act as it now stands were a new piece of legislation, and we were asked to gather the purpose of sec. 254 without reference to previous legislation, it seems to me that it would have been

perfectly clear that the object which Parliament had in view in passing the section would have been merely to prevent damages resulting from animals getting upon the railway, and that the plaintiffs in this case could not have recovered. But, in construing an Act whose meaning is doubtful, it is, of course, proper to look at the previous state of the law, previous statutes on the same subject, as well as previous decisions upon them. Adopting this course, I agree with the learned trial Judge that the only possible inference to be drawn from the action of Parliament in 1903, in omitting the provisions of sec. 124, sub-sec. 3, of the Act of 1888, which declares that "the company shall be liable for all damages done by its trains and engines to cattle, horses, and other animals not wrongfully on the railway and having got there in consequence of the omission to make complete and maintain such fences and cattle-guards as aforesaid," and in leaving in force merely sec. 289 of the Act of 1888, providing for liability generally for the full amount of the damages caused by the omission on the part of the company to do any act or thing required by the Act to be done by them—is this, that the company are liable for all damages, of whatever kind, resulting from the omission to fence.

With regard to the contention that there was in any case no obligation to put the fence upon the boundary line, I do not think it can be sustained. Much was said as to the proper interpretation of the word "railway" as used in sub-sec. 1 (a) of sec. 254. What, it is asked, does the expression "on each side of the railway" here mean? My view is that whatever the word "railway" means at that point in the section, it ought to mean elsewhere in the section as well. Now sub-sec. 4 says, "Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall be required to erect and maintain such fences," &c. What sense can be made out of this sub-section unless we read the word "railway" as meaning "the right of way" of the railway? It is obviously absurd if we give it any other meaning, and I think the same meaning must be given in sub-sec. 1 (a).

It is true that Sedgewick, J., in the case of Grand Trunk R. W. Co. v. James, 31 S. C. R. at p. 432, adopted a different view, but I do not gather from the report that his view on that point formed the ratio decidendi of the

case, but that the decision turned really upon the Court's view of the then purpose and object of the Act, which, as I have said, must be held to have been altered owing to the amendments which have been made. The Supreme Court there proceeded entirely upon the theory, no doubt quite correct as the statute then stood, that the sole object of the legislation was to prevent animals getting upon the track, and it is quite easy to see that Mr. Justice Sedgewick was there much influenced by this consideration in his discussion of the interpretation to be put upon the words "each side of the railway." Here, however, we have to construe those words in an Act whose object, as I hold, is much wider and is not confined to the mere question of animals trespassing upon the railway line. It is, of course, in one sense a question which point you should take as first decided, that is, whether you should first interpret the words "on each side of the railway," and then make your inference as to the object of the Act, or whether, having first decided as to the object and general purpose of the Act, you should then proceed to interpret the particular words in question. For myself, I think the latter is the proper course, and that, having decided that that object and purpose is a much wider one than merely to prevent animals getting upon the track, we are now free to distinguish the case in the Supreme Court as having been decided upon a different statute, with a different object, and that we are, therefore, not in the present case bound to adopt the interpretation put upon the words in question by Sedgewick, J. This being so, the result is, that the appellants were, in my opinion, bound in law to erect a boundary fence on each side of their right of way through the plaintiffs' land.

There remains, therefore, only the question whether the fact that the plaintiffs' own fence did not comply with the terms of the Fence Ordinance furnishes any defence to the action. Upon this point also I agree with the result arrived at by the learned trial Judge. In my opinion, the Fence Ordinance has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which the animals doing the damage have entered. The evidence here shews clearly that the animals doing the damage entered on the plaintiffs' land owing to the non-existence of the boundary fence, and it would be a very strange result if the appellants could take advantage of their own omission to build a portion of

the fence and turn around and say, because on the other 3 sides the fence was not a lawful fence, and although it was not there that the animals entered at all, that therefore they should be relieved. I do not think that any such absurd result was ever intended by the Ordinance.

I therefore think the appeal should be dismissed with costs.

ALBERTA.

JULY 24TH, 1908.

FULL COURT.

REX v. CANADIAN PACIFIC R. W. CO.

Justice of the Peace—Jurisdiction — Information—Conviction—Territorial Jurisdiction—Presumption—Evidence.

Application by the defendants, the Canadian Pacific Railway Company, who were convicted by a magistrate on 15th December, 1907, for an offence under sec. 6 of the Lord's Day Act, for an order for a writ of certiorari to bring up the conviction and for an order quashing the conviction.

The summons was issued by STUART, J., and was returnable at Macleod, but was there referred by the Chief Justice, by arrangement between the parties, to the Court en banc.

R. B. Bennett, K.C., for the applicants.

The judgment of the Court (SIFTON, C.J., SCOTT, HARVEY, STUART, and BECK, JJ.), was delivered by

STUART, J.:—Several grounds are set forth in the summons, but the only ground relied upon is that, although the conviction shews upon its face that the offence charged was committed "at Pincher Creek in the said province," which expression is referable to the caption of the conviction in which the province of Alberta is mentioned, and although the information upon which the defendant was tried alleges that the offence was committed "at Pincher Creek in the said province," in the same way and with the same reference to the caption, yet, inasmuch as, upon

looking at the evidence, it appears that there is nothing to shew that Pincher Creek is in the province of Alberta, that is, within the jurisdiction of the magistrate, the Court cannot take judicial notice of such a fact of local topography, and that, therefore, the conviction cannot be sustained.

I think the point in the case is fairly covered by the decision of the Ontario Common Pleas Division (Meredith, C.J., and Rose, J.), in Regina v. McGregor, 26 O. R. 115. In that case the conviction did not even shew upon its face that the offence was committed within the jurisdiction of the convicting magistrate and there did not appear to be anything in the depositions shewing where it was committed. The warrant of apprehension, however, upon which the accused was arrested and which was returned with the depositions, stated that the offence alleged was committed "at the township of Dunnet," and the heading of the depositions read "Sept. 6. Magistrate's Court at North Bay 3 this p.m. Mrs. McGregor appeared charged with unlawfully selling liquor at her house in the township of Dunnet on the 10th August, 1904. The charge having been read over to her, she pleaded not guilty." This was all there was to shew where the offence was committed, and the Court held that there was sufficient to shew that the offence was committed within the jurisdiction of the magistrate, taking judicial notice that the township of Dunnet was in the district of Nipissing.

In the present case, the conviction on its face shews jurisdiction, and, while I am strongly inclined to the opinion that the Court will not go behind the conviction in such a case in order to discover something in the depositions which will invalidate it, yet it is clear, upon the principle of the case cited, that, even if jurisdiction were not shewn on the face of the conviction, we have enough before us to justify us in amending the conviction, even if that had been necessary. The information shews that the offence was alleged to have been committed within the province of Alberta, and we must presume that it was for such an offence that the defendant was tried and convicted. I do not think therefore the Court ought, particularly when jurisdiction appears on the face of the conviction, to scrutinize the depositions in order to discover an absence of exact evidence to establish local jurisdiction.

The application should be dismissed.

ALBERTA.

SCOTT, J. JULY 24TH, 1908.

TRIAL.

NORTH-WEST THRESHER CO. v. ANDREWS.

Sale of Goods—Action for Price—Express Warranty—Implied Condition as to Fitness—Breach—Evidence—Findings of Jury—Counterclaim.

Action for $4,153.20, being the principal and interest due upon 6 promissory notes given by the defendants in part payment for a steam traction engine and steam plough outfit purchased by them from plaintiffs. Counterclaim for part of purchase money paid and for freight, etc.

C. B. Reilly, for plaintiffs.

G. H. Ross, for defendants.

SCOTT, J.:—On 3rd May, 1906, the defendants in writing ordered from the plaintiffs "one N. W. Cross compound traction engine," with certain appliances, at the price, including freight thereon, of $4,081, and also "one Lowell steam plough outfit" complete, with certain specific attachments therefor, at the price of $375. The orders for these machines contained certain stipulations, one of which was that the machinery was sold subject to the express warranty and none other, made to apply separately to each machine or attachment so ordered, that the same was well built, and with proper use and management capable of doing well the work for which it was intended, and that the engine was capable of developing its rated horse-power, conditioned however that the purchasers should set up, start, and operate the same in a proper and skilful manner and without changing the original construction of any part of it, that the purchasers should have 3 days after it was first started to ascertain whether such machinery was or was not as warranted and represented, and that, if they deemed it was not, they should at once discontinue the use of it and state full particulars wherein it failed by registered letter mailed

at once to the plaintiffs at Stillwater, Minnesota, and await a reasonable time until the plaintiffs should send a man to put it in order.

The engine and steam plough outfit were delivered to the defendants at Airdrie station by the agent of the plaintiffs, one Kent, who, before the delivery thereof, and before the defendants were permitted to test the working thereof, required them to pay the freight and the down-payment provided for, and give the promissory notes for the balance of the purchase money, and sign a receipt stating that the machinery was accepted in and in fulfilment of the written orders therefor, and subject only to the conditions and warranty therein contained.

Immediately after the notes and receipt were given, Kent and one Littlefield, an engineer who was there at Kent's request, took the machinery to a field about 5 miles from Airdrie which defendants had a contract for ploughing, and they there on several days attempted to make it work, but without any reasonable success. They then left and did not return. One of the defendants states, and it is not contradicted, that when Kent was leaving he stated that he would wire for an expert to come up. After waiting for some days for the arrival of the expert, the defendants went to Calgary to see Kent, but, failing to find him, they returned and tried to make the machinery work, without success. They then attempted to take it back to Airdrie, but, owing to the state of the roads, they were unable to deliver it there and left it about two miles from Airdrie. A few days afterwards they instructed their solicitor to notify the plaintiffs.

The action was tried before me with a jury. I submitted certain questions to them, and their answers thereto, so far as they appear to me to be material, were to the effect that the acceptance of the machinery by the defendants was subject to the condition that it would work satisfactorily, that it was not well built or capable of doing well the work for which it was used by the defendants, that while it was used by the defendants it was under proper care and management, that Kent promised to send an expert to run it, that the defendants were reasonably justified in relying upon his promise and awaiting the arrival of the expert, and that the machinery as a steam plough was worthless.

The contract between the parties appears to be similar to that referred to in Reeves v. Chase, 8 W. L. R. 313. I agree with the conclusion reached by my brother Beck in that case that the implied condition that the article sold should be reasonably fit for the purpose for which it is intended is not displaced by an express warranty such as that given by the plaintiffs in this case. Frost and Wood Co. v. Eberts, 3 W. L. R. 59, does not appear to me to be applicable to the circumstances of the present case, as it does not appear from the description of the machinery in the orders referred to, nor does it otherwise appear, that it was sold under a patent or trade name.

It is beyond doubt that the intention of the parties was that the whole of the machinery was to be used together as a ploughing machine, and I therefore think that, notwithstanding the provision in the agreement that the warranty should apply separately to the several parts thereof, the condition that it should be reasonably fit for the purpose for which it was intended, is applicable to it as one machine.

I therefore give judgment for the defendants with costs.

The defendants counterclaim for, among other things, the down payment made by them and for freight paid by them. The jury found that if they were entitled to recover on their counterclaim, they were entitled to $780.58 made up as follows:—

Paid on account of purchase money	$500 00
Freight	214 40
6 per cent. interest for 25½ months.....	91 18
	805 58
Less fees for ploughing	25 00
	$ 780 58

As the defendants were entitled to recover interest only at the rate of 5 per cent. upon the moneys paid by them, this amount should be reduced by $16.58.

I therefore give judgment for the defendants upon their counterclaim for $764 and costs.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

BURKE v. NOLIN.

Dismissal of Action—Failure of Plaintiff to Proceed at Trial —Refusal of Application to Postpone—Plaintiff Appearing by Counsel—Rule 255—Appeal to Court en Banc—Right of Appeal—Application to Trial Judge to Re-open Case—Enlargement of Time for—Rule 548—Legal Holiday—Delay.

Appeal by plaintiff from judgment of JOHNSTONE, J., at a sittings for the trial of actions, dismissing the action, the plaintiff not being ready to proceed.

W. M. Martin, Regina, for the plaintiff.

J. A. Allan, Regina, for the defendant.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—This action was set down for trial at the sittings of the Supreme Court at Battleford on 14th April last. The cause was reached in due course, and counsel for the plaintiff applied to postpone the trial, on the ground of the absence of a material witness. He had no material, however, upon which his application was based, other than his statement, and my brother Johnstone, who was the presiding Judge, refused to grant the application without the production of an affidavit setting forth facts sufficient to warrant him in doing so, and he gave counsel two days to prepare such affidavit and renew his application. The case was again reached on 17th April, and called, and, counsel for the plaintiff being present, he again urged that the trial be postponed, but he did not produce any affidavit, and the learned trial Judge dismissed the action under Rule 255 of the Judicature Ordinance. The plaintiff thereupon gave notice of appeal to this Court, for an order to set aside the judgment and assess the damages, and enter judgment for the plaintiff, or for a new trial, or for such other order as to the Court might seem just.

One ground of appeal set forth is that the action was dismissed without trial on its merits by way of punishment for the plaintiff not being prepared to go on with his action. I just stop here to state that this ground of appeal is so utterly absurd that it is not worth while taking time to notice it further.

The other grounds of appeal are: that the plaintiff's reason for not being prepared to go on with the action was a justifiable one, being the absence of a necessary and material witness; that the reason of the absence of the said witness was the failure of the plaintiff to have him examined before the trial; also failure to appear at the trial by reason of the plaintiff's reliance upon an arrangement made between counsel, or believed by the plaintiff to be made between counsel, to admit such witness's evidence to be taken by commission subsequent to the trial; that the plaintiff had a good cause of action, and was entitled to a trial on the merits; and that the judgment was given on a legal holiday.

Leaving out the last ground of appeal for the present, and also the first, which I have disposed of, the others might have been good grounds for postponing the trial, if they had been properly established by sworn testimony, but, in the absence of any such material, there is no question in my mind but that the learned Judge was justified in dealing with the case. The fact that the learned Judge directed the application to be supported by an affidavit seems to be disputed by the affidavit of Mr. Panton, the plaintiff's solicitor. I have consulted the learned trial Judge, however, and he states that the facts as I have set them forth in this judgment are correct.

The defendant gave notice of a motion returnable before this Court to dismiss this appeal, on the ground that no appeal lay, and on the hearing of that motion it was urged that, inasmuch as the plaintiff had appeared by counsel, Rule 255 was not applicable. Apparently that was the first time that this ground was raised. It was also contended that, that Rule not being applicable, there could not be an application made to the Judge under Rule 256. And by way of further complication it was stated by counsel for the plaintiff that he did not set up that the learned trial Judge was wrong in what he did. I must say that, that being so, I cannot see what the plaintiff is appealing from, unless it be that the 15 days prescribed by Rule 256 have expired.

If the learned trial Judge was in error in dismissing the action under Rule 255, he ought to have given judgment for the defendant. In that case possibly the plaintiff would have found it difficult to have the case opened under any circumstances; but I may state that I am of opinion that the learned Judge was correct in dismissing the action under Rule 255. I can find no case where that question has been decided, and I can only find one case where it clearly appears that the plaintiff appeared by counsel, and that is Robinson v. Chadwick, 7 Ch. D. 878, where Fry, J., dismissed the action under the corresponding Rule in the English Rules, although the plaintiff appeared by counsel. I am of opinion that the spirit of this Rule is intended to apply where a plaintiff does not appear either by himself or his counsel for the purpose of going on with the trial. If counsel appears, but the plaintiff does not, and counsel is not prepared to go on to trial without him, I am of opinion that this Rule, according to its fair spirit, is applicable. It should be so held in mercy to the plaintiff, because, if his action is dismissed under that Rule, it would seem that the judgment might be in the nature of a judgment of nonsuit, and he might be able to bring another action. If that Rule cannot be adopted, and the ordinary judgment is entered against the plaintiff, it is very doubtful. to my mind, whether it would be open to him to bring another action.

It was urged that there is no appeal from an order made under Rule 255. I am inclined to think that the contention is correct, unless under peculiar circumstances, as, for instance, in Armour v. Bate, [1891] 2 Q. B. 233. An appeal was taken in that case, but the trial Judge did not make the order that he ought to have made. He ordered judgment to be entered for the defendant, whereas he ought to have made an order dismissing the action; and this case will serve to shew the distinction between the two judgments. The Court held in that case that the plaintiff failed in his appeal, but they altered the judgment from a judgment against the plaintiff to a judgment dismissing the action. In Arnison v. Smith, 41 Ch. D. 348, also, it might appear that an appeal would lie, but that case was peculiar in its character because some of the plaintiffs appeared and others of them were absent; and Kekewich, J., who tried the case, gave judgment against those of the plaintiffs who did not appear that they should pay the costs occasioned by their

being joined as plaintiffs. This order was varied so as to make the order without prejudice to those plaintiffs bringing a fresh action. In Vint v. Hudspith, 29 Ch. D. 322, Cotton, L.J., laid down the following rule: "The plaintiff's proper course was to apply to the Judge to restore the cause, on the ground that the plaintiff was absent per incuriam. I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the Judge who gave the judgment to restore the action." And then he went on to state: "The appeal must stand over for a fortnight to give time to the plaintiff to make such application to the Judge as he may be advised." Bowen, L.J., practically agreed with all this.

The reason given for appealing to this Court—because the 15 days have elapsed without an application being made to a Judge—does not appear to me to warrant the appeal. In Mitchell v. Wilson, 25 W. R. 380, where a defendant had to make application within a specified time, the Court granted an extension of time to enable him to set aside the judgment. In Bradshaw v. Warlaw, 32 Ch. D. 403, which came up under a Rule of the Palatine Court prescribing time for applying, the Court held that it was not necessary to make a substantive application for an extension of time, and Lindley, L.J., at p. 407, stated: "I also entertain a clear opinion that the Judge had power to enlarge the time." Walter v. James, 34 W. R. 29, came up under the Rule corresponding to Rule 255 of the Judicature Ordinance; and North, J., held that the application should be made within the 6 days, and that he had no power to extend the time. I am of opinion that the first two cases I have cited upon the subject, however, are decisive, especially as the holdings were by the Court of Appeal. I cannot help but feel also that under Rule 548 of the Judicature Ordinance the Judge has power to enlarge the time prescribed in Rule 255 for making the application. That Rule is: "The Court or a Judge shall have power to enlarge or abridge the time appointed by this Ordinance or the Rules of Court, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require, and any such enlargement may be

ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

I am of opinion that there is nothing in the ground that the order was made on a legal holiday. The Court was sitting, the parties were in Court, no objection was raised, and, as a matter of fact, I understand that the Court had been sitting all day before this matter was reached.

As to dismissing this appeal on this application: I am free to confess I have had some difficulty in coming to the conclusion that this appeal should be dismissed until it was reached, if it was entered, or by reason of it not being entered in due course, and an application was made to dismiss it on that ground. All the questions raised by the appeal were discussed on this application, and if this application is refused and the plaintiff proceeds, it is clear that his appeal must be dismissed, and with costs. Under such circumstances, I am of opinion that in mercy to him this appeal should be struck out, and with costs of the motion to the defendant, and that the plaintiff be at liberty to make such application to Mr. Justice Johnstone as he may be advised. I have to point out that it seems to me that the plaintiff has been unreasonably dilatory in this matter. He was not ready for trial when it was called on, and he felt called upon to come to this Court after nearly 3 months for time to perfect a simple appeal of this character, which I think could have been prepared by any diligent man in two days—certainly in three.

SASKATCHEWAN.

JULY 10TH, 1908.

WEEKLY COURT.

SAWYER-MASSEY CO. v. BOYCE.

Sale of Goods—Conditional Sale—Property not Passing to Vendee — Possession Given to Vendee — Seizure under Execution against Vendee—Claim by Unpaid Vendors—Interpleader—Evidence—Order for Goods—Proof of Signature by Vendee — Proof of Delivery of Goods — Goods Transferred from Manitoba to Saskatchewan—Identity of Goods Seized with those Purchased—Order for Sale not Registered in Saskatchewan—Sale Made in Manitoba—Manitoba Law.

Appeal by plaintiffs, execution creditors, from judgment of NEWLANDS, J., in favour of the American-Abell Engine

and Thresher Co., claimants, upon the summary trial of an interpleader issue.

C. P. Fullerton, Winnipeg, for the plaintiffs, appellants.

A. B. Hudson, Winnipeg, and H. Y. MacDonald, Moosomin, for the claimants.

The judgment of the COURT (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ., was delivered by

WETMORE, C.J.:—The sheriff of the judicial district of Moosomin seized under an execution against the defendant at the suit of the plaintiffs a threshing engine, separator, truck, and tank. The claimants, the American-Abell Engine and Thresher Co., Ltd., claimed this property, the sheriff interpleaded, and the plaintiffs contested the claimants' claim. This property was seized at Esterhazy, in the judicial district above mentioned. The claimants contend that this machinery was ordered from them by the defendant in Manitoba on 2nd September, 1903, to be delivered to the defendant at Miniota in the said province. It was provided in the order that the purchaser should be entitled to immediate possession of the machinery, but that the property in the same was not to pass to him until the purchase money and the notes given therefor and any renewals thereof had been fully paid; that the machinery was delivered at Miniota in pursuance of such order, and the defendant had remained in possession thereof ever since, until it was seized by the sheriff; that between the time of such delivery and the seizure by the sheriff the defendant moved the property without the knowledge or consent of the claimants into the province of Saskatchewan; that the machinery at the time of such delivery to the defendant had plainly marked upon it the name and address of the manufacturer of such machinery; and that the defendant has not paid for this machinery, and there is due in respect of it $3,381.13 and upwards. The facts under which the claimants so claim were practically established by evidence or conceded.

It is contended in the first place that there is no evidence that this order for sale was ever signed by the defendant. The affidavit upon which the claimants set up their claim was made by one Lawrence Hartshorne, their manager in the province of Manitoba, and he stated in such

affidavit that he had a personal knowledge of the facts therein referred to. This was practically the whole of the contents of the 1st paragraph of his affidavit, and he swore in the following paragraph, that "on the 2nd day of September, A.D. 1903, the above named claimants (meaning the claimants herein) entered into an agreement with the above named defendant (meaning the defendant herein) to sell and deliver to the said defendant certain threshing machinery, to wit," etc. Then he goes on to specify the machinery, some of which answers to the machinery in question, and he then goes on to state that "the terms upon which the said machinery and all of it was sold and delivered to the said defendant by the said claimants are truly set out in the paper writing hereunto annexed and marked as exhibit A, and which said exhibit A is the original order for the said machinery given by the above named defendant and accepted by the above named claimants, upon the terms and conditions therein set forth and contained." Exhibit A is the order to which I have before referred. It will be marked that Hartshorne, with a personal knowledge of the fact, states that this exhibit A is the original order given by the defendant. Uncontradicted, that is sufficient to establish the making of the order by the defendant. Hartshorne was not a subscribing witness, but it was not necessary that an affidavit of the subscribing witness should be produced—any person who was prepared with knowledge of the facts to prove it was competent to do so, and, as I have already stated, Hartshorne has sworn that he had knowledge.

It was also urged by the plaintiffs that there was no evidence of the delivery of the machinery to the defendant; but Hartshorne swore in the 3rd paragraph of his affidavit that "in pursuance of the agreement the said claimants duly delivered to the said defendant the said threshing machinery and all of it, and the said machinery at the time of delivery as aforesaid had plainly marked upon it the name and address of the manufacturer of the said machinery." The contention by the plaintiffs was that Hartshorne was only swearing to information and belief in this respect. The difficulty is that in his affidavit, as I have before stated, he states that he swore to this fact from personal knowledge of the fact. There are some statements in his affidavit as to which he distinctly states that he makes them from information and belief, and sets forth the

grounds of his information and belief. I am of opinion, therefore, that this appeal cannot succeed on either of the two grounds that I have mentioned.

It was further urged that there was no evidence that the machinery in question had been brought into Saskatchewan from Manitoba by the defendant, or that it was the property sold and delivered by the claimants to the defendant in Manitoba. I have very great doubts, looking at the affidavit of Hartshorne, whether there was evidence to establish that fact. The evidence of that fact was contained in Hartshorne's affidavit, and was professedly derived from information and belief. It would have been, I think, quite sufficient if this had been an interlocutory proceeding; for instance, if it was merely for the purpose of setting forth the nature of the claim, and, if the claim was disputed, to have an issue ordered or to have the question of the right of property tried out in a summary way, I think such an affidavit would be sufficient; but, if it was dealt with as evidence for the purpose of deciding the right of property, that would have been with a view to the final disposition of the property, and it would occur to me that the proceeding would not then be interlocutory, and it would require better evidence than that founded on information and belief to enable the Court to dispose of the rights of property. But I have interviewed the learned Judge who heard this application in the first instance, and he informs me that no question was raised before him as to whether the property brought into Saskatchewan was the property sold and delivered in Manitoba. He states, on the contrary, that it was tacitly admitted to be the same machinery, and that the only question raised with respect to the transfer from one province to the other was that there was no evidence establishing when it was brought into Saskatchewan. Under such circumstances, I am of the opinion that it is not open to the appellants to raise the question I am discussing, and, as to the time when it was brought, that is immaterial so long as it was after the claimants' sale to the defendant.

It was also set up that there was no evidence that the machinery seized by the sheriff was part of the machinery sold in Manitoba. It is only necessary to make the same observations with respect to this objection that I made as to the last. The learned Judge informs me that no such

objection was raised before him, that it was conceded all through that the machinery was the same.

This brings me down to the real question which is at issue between these parties. The order for sale before referred to was not registered with the registration clerk for the registration district of Moosomin, and it was urged therefore that it was void against the plaintiff under ch. 44 of the Consolidated Ordinances. It will be observed, however, that the sale took place in the province of Manitoba. Section 2 of ch. 99 of R. S. M. 1902, being an Act respecting lien notes, was proved, and that provides as follows: "On, from, and after the 27th day of July, in the year 1886, receipt notes, hire receipts, and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattels should pass without any ownership therein being acquired by the bailee, were and shall be only valid in the case of manufactured goods which, at the time the bailment is entered into, have the manufacturer's name or some other distinguishing name painted, printed, or stamped thereon or otherwise plainly attached thereto; and no such bailment shall be valid unless it be evidenced in writing, signed by the person thus taking possession of the chattels." It will be seen, therefore, that the order in question complied with the provisions of the law of Manitoba. It appears by that Act that registration was not necessary; in fact it was prohibited. That being so, here we have a sale of property good as between the vendor and the vendee in Manitoba. where it was made, and also good on the part of the vendor as against the creditors of the vendee; that property is brought into Saskatchewan, and I entirely agree with the learned trial Judge in that I am unable to distinguish this case from the decision in Bonin v. Robertson, 2 Terr. L. R. 21. The instrument in that case was a mortgage, and it was urged in the first place that it was decided under Ord. No. 18 of 1889, and that sec. 3 of that Ordinance only applied to mortgages or conveyances of goods and chattels "made in the Territories." That is quite true, and McGuire, J., in delivering the judgment of the Court in that case, referred to it at p. 25, but the judgment did not turn upon that provision. Upon reading it, it will be found that it was held that the question of the passing of the property depended upon the lex rei sitæ, and that the right of property of the mortgagee, being good by the laws of

Minnesota, was not affected by the property having been brought from there into the North-West Territories, and that the mortgage made in Minnesota, although not registered in the Territories, was good as against a purchaser from the mortgagor who was in possession of the property. At p. 28 McGuire, J., lays it down as follows: "That the laws in force where the property is situate and where the contracting parties reside must govern as to the passing of the property, is clearly laid down by Crompton, J., in Cammell v. Sewell. He quotes with approval the opinion expressed in the Court below by the Chief Baron. 'If personal property is disposed of in a manner binding according to the laws of the country where it is, that disposition is binding everywhere.'" This principle will be found to run through the whole of that judgment. I may add that, in my judgment, the amendment of the Ordinance of 1889 (made by Ord. No. 13 of 1893), by striking out the words "made in the Territories" from sec. 3, does not affect the question.

It was further urged, however, that the question in this case arises under ch. 44 of the Consolidated Ordinances, commonly known as the Lien Note Ordinance, and not under the Bills of Sale Ordinance. I cannot see that that makes any difference. The principle that was laid down in Bonin v. Robertson, as to the lex rei sitæ governing it, applies as well to the Lien Note Ordinance as to the Bills of Sale Ordinance. Moreover, sec. 2 of ch. 44 provides for the registration, and is as follows: "Such writing or a true copy thereof shall be registered in the office of the registration clerk for chattel mortgages in the registration district within which the buyer or bailee resides, within 30 days of such sale or bailment, and also in the registration district in which the goods are delivered or to which they may be removed within 30 days of such delivery or removal." Now, how in the case of an order for chattels executed without the province is that provision to be complied with? It will be noticed that it is to be registered in the registration district within which the buyer or bailee resides, within 30 days of the sale, and also in the registration district to which the goods may be removed within 30 days after the removal. Take an order, then, executed in the province of Manitoba; it cannot be registered there to comply with the provisions of our Ordinance, because we cannot control the registry offices of Manitoba or control people

residing in Manitoba as to what they shall or shall not do in so far as their civil rights are concerned, unless they happen to be in this province. And I have drawn attention to the fact that under the Manitoba laws instruments of this sort cannot be registered at all, and consequently it would be no compliance with the law to register the lien note in the district to which the goods may be removed, because the law requires that the instrument should be registered in both places—it makes no exception.

I am, therefore, of opinion that the judgment of the learned trial Judge was right, and that this appeal should be dismissed with costs, and the judgment of the trial Judge affirmed.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

MEARS v. ARCOLA WOOD WORKING CO.

Interpleader—Application by Garnishees—Remedy under Rule 392—Attachment Proceedings before Judgment—Rules of Court—Discretion—Practice.

Appeal by the Royal Insurance Co. of Liverpool, garnishees, from order of WETMORE, C.J., 6 W. L. R. 547, discharging an interpleader summons.

The appeal was heard by PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

E. L. Elwood, Moosomin, for the appellants.

J. A. Allan, Regina, for the defendants and the Independent Lumber Co., claimants.

PRENDERGAST, J.:—The plaintiff sued the defendants for $310.56 debt, and served a garnishee summons on the garnishees for that amount and costs. The Royal Insurance Company of Liverpool, garnishees, admit an indebtedness of $2,000 for losses under an insurance policy wherein the defendants are the assured and the Merchants Bank of Canada the beneficiaries, to the extent that their interest may appear.

The Merchants Bank claim $1,440 as such beneficiaries; the Independent Lumber Company claim the whole $2,000 by virtue of an assignment from the defendants of their interest in the said policy; and there are also other claims for lesser amounts.

The Royal Insurance Company having taken out an interpleader summons to have their liability determined by the Court, the learned Chief Justice, upon its return, dismissed the application for an issue, and his decision is now appealed from.

The garnishee summons herein is, as stated, for $310.56 and costs.

Of the garnishees' indebtedness to the defendants, that is all that the plaintiff is interested in, all that was ever attached, all that is supposed to be brought into Court, and all that is subject to the future order of the Court under the garnishee proceedings.

As to this amount of $310.56 and costs, the garnishees and the claimants have, under Rule 392 of the Judicature Ordinance, the full remedy that they require. They have all the latitude under it to bring the interested parties into Court, and to shew either that the defendants were never entitled to the amount, or that, although once entitled, their claim has since passed to one of them by assignment or otherwise.

Inasmuch as the remedy provided by this Rule is less expensive and more expeditious and simple, and as it, moreover, affords, to the extent of the amount attached, all the relief that an interpleader could give, I am of opinion that it is intended to be the only remedy properly applicable to such cases.

In the present case, however, the garnishees, being indebted in an amount in excess of that which was attached, seek by interpleader to have the Court determine the question of their total liability.

It seems to me that, owing to the excess involved over and above the amount attached, the plaintiff's objection to such an issue being grafted on his action is well founded, on the ground that he never claimed such excess, that it is not attached, that it appears nowhere in the action, and that he never was in any way whatsoever concerned in the matter. The position taken by him—and rightly so in my opinion—would seem to be, that having never had to do with the other parties' differences in this respect, and hav-

ing no interest therein, he objects to their being fought out on his ground.

With regard to the excess over the amount it called for, the garnishee summons did not alter in the least the status of defendants, garnishees, or claimants; so that, not being interfered with, they are simply left, as to that excess, in the same position and with the same relief as if no garnishee summons had issued.

In this view, the objection to the interpleader is not founded on the nature of the proceeding, but on the fact that part at least of its subject-matter is involved neither in the action generally nor in the garnishee proceedings.

It is quite possible that the garnishee might be entitled to an interpleader at least with respect to part of his liability, but then, only as an independent proceeding, and not as an incident of, and in, this action.

The principle that regard should be had to avoiding multiplicity of suits, was never made a reason why interlocutory proceedings of any kind should thus be grafted on an action, when the subject-matter was not the same and the plaintiff in the action could in no way be affected by such proceedings.

In short, if the issue is with respect to the amount attached by the garnishee summons, the proper relief is under Rule 392; if not, the garnishees and claimants have no standing in the action.

The appeal should be dismissed with costs.

NEWLANDS and LAMONT, JJ., concurred.

JOHNSTONE, J.:—In this case an application was made on behalf of the garnishees, the Royal Insurance Company of Liverpool, for relief by way of summons under Rule 431 of the Judicature Ordinance. The application was supported by the affidavit of John Hogan, the Winnipeg manager of the applicants, proving, among other things, service on the applicants of the garnishee summons issued in the action of the present plaintiff against the present defendants before judgment on 25th April, 1907; that under a certain policy of insurance the company named had insured the defendants' property in the sum of $2,000, the loss, if any, to be payable to the Merchants Bank of Canada as their interest should appear; that on 18th April, 1907, the property insured was destroyed by fire and on the 29th of the same month an appraisement of the loss had been

effected, and that the applicants were ready and willing to pay the loss, to the extent of $2,000, into Court to abide the result of the interpleader proceedings. This affidavit further stated that these moneys were claimed by the plaintiff and also by the Merchants Bank of Canada on account of certain advances made by the bank to the defendants and by the Independent Lumber Company under an assignment from the defendants of 20th April, 1907, and the usual allegations denying interest in the subject-matter and collusion were also set out in this affidavit. It also appeared from the application for interpleader that an appearance had been entered by the garnishees disputing liability of the applicants to the defendants under Rule 390 of our Ordinance. Upon return of the summons cause was shewn and an order made discharging the summons with costs, and from this order the applicants appeal.

With the question of the right to claim relief under Rule 431, because of the position in which the applicants placed themselves through their having disputed liability to the defendants, removed, I quite agree with the décision of the learned Chief Justice and the reasons given by him for his judgment. The defendants in the garnishee action had disputed their liability to the plaintiff, and this question of liability had yet to be determined by a trial of the issues joined between the parties. The service of the summons on the garnishees would create no liability; it did nothing more than bind the debt owing from the garnishees to the defendants. Judgment obtained in the action by the plaintiff against the debtors would not create the relationship of debtor and creditor between the plaintiff and the garnishee. Fry, L.J., in his judgment in In re Combined Weighing and Advertising Machine Co., 43 Ch. D. 99, at p. 105, so held, and in speaking of the effect of the order made under the English Rule 2, Order 45—a Rule similar to our Rule 385—asked the question: "What is the meaning of the words, 'bind the debt in his hands'? What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' There is no transfer of the debt, and he is not created a creditor." And here the word "transfer" is used to mean transfer by way of assignment, security, or otherwise, and the remedies referred to are subject to be controlled by the discretionary powers of a Court

or Judge, as will be seen hereafter. See also Norton v. Yates, [1906] 1 K. B. 112. In England an attaching order nisi is only made after judgment has been obtained against the defendant in the action; the service of the garnishee summons under our practice has the same binding effect as that of an order nisi in England. The word "liable" means "under an obligation:" Re Hill, [1896] 1 Ch. 962; and "liability," as used in Rules 390, 391, and 431 of our Judicature Ordinance, imports obligation—an obligatory relationship under Rules 390 and 391 between the garnishee and the debtor sued, and under Rule 431 between the claimant and the applicant for relief. Norton v. Yates, and Roberts v. Death, 8 Q. B. D. 319, are authorities in favour of the applicants' right to relief in the garnishee action. In the latter case it appears that one Michael Death recovered a judgment for £40 against one Castle, whereupon one John Roberts, who was a judgment creditor of Death, obtained an order nisi attaching all debts due from Castle to Death to answer the Roberts judgment. Before the return date the Death solicitors wrote to the solicitor for Roberts informing him that Death was trustee for the claimant Mrs. Wells, and that the money for which Death had recovered judgment against Castle belonged solely to Mrs. Wells. On 31st May the order nisi was made absolute, and Castle thereupon paid over the money to Roberts. Subsequently a summons was taken out by Mr. and Mrs. Wells and Death to shew cause why the order of 31st May should not be rescinded or varied by directing the payment into Court of the £40, to abide the event of an issue between the judgment creditor and the judgment debtor and the claimants, Mr. and Mrs. Wells, or some of them. This summons was on its return dismissed by the Master. The dismissal on appeal was affirmed first by Mathew, J., at Chambers, and subsequently by the Queen's Bench Division, from which latter judgment the judgment debtor and the claimants appealed, and the appeal was heard by Brett, Cotton, and Lindley, L.JJ., and allowed. Brett, L.J., delivering judgment (at p. 322), referring to the fact of the omission of the garnishee to suggest that the money belonged to Death as trustee, said: "It is said that because the garnishee did not suggest that that was the fact, the cestui que trust was estopped from shewing it; and further, it is said that such an injustice can be perpetrated by the order of the Court. I cannot believe in this. The Rules 6 and 7 of

Order XLV., on which reliance is placed as governing this matter, were copied from secs. 29 and 30 of the Common Law Procedure Act, 1860 (23 & 24 Vict. ch. 126), which was passed at the time when the common law Courts could not have given relief; whereas the equity Court certainly could have done so. The garnishee order absolute would now be made by a Master acting for a Judge who, under the Judicature Acts, would have an equitable jurisdiction. The equity Court, as it seems to me, would never have allowed the money of a cestui que trust to be applied to pay the debt of a trustee, and I can see nothing which should prevent a Judge from saying, when the matter is called to his attention, that a garnishee order shall not under those circumstances be made absolute. Although it is true the suggestion to that effect cannot be made by the cestui que trust under either Rule 6 or 7—our Rule 292 makes provision for such a suggestion—still it seems to me that a Court of equity would listen to such a statement on the proceedings for a garnishee order, and would either, if there was no dispute as to the fact, then make an order that the money should be paid over to the cestui que trust, or decline to make the garnishee order absolute, or if there was a dispute as to whether the money was trust money, would consider it reasonable to order the money to be paid into Court to abide the event of an inquiry." At p. 323 Cotton, L.J., stated: "Here the money due to the execution debtor Death is alleged to be trust money, and it is clear that a Court of equity always interfered to prevent goods which were being held in trust from being taken in execution to satisfy the debt of the trustee. It is said that the Judge could not refuse to make the order, because the case is not within the Rules of Order XLV. I think it is not within Rule 6, because that applied only where the garnishee for his own protection suggests that the debt belongs to a third person; but I am not satisfied that it is not within Rule 7, for that says not merely on hearing the allegation of such third person, but 'of any other person whom by the same or any subsequent order the Court or Judge may order to appear,' and that seems to me to give power to the Court or Judge to cite any one else, and to inquire as to the nature of his claim." At p. 324 Lindley, J., says: "What was done here was this: before the garnishee order was made absolute, notice was given to Roberts and his solicitor that the judgment was recovered by Death as trus-

tee for Mrs. Wells, and that, therefore, Roberts had no business to take it, and when the parties were before the Master the latter was informed that it was not Death's money. Then there was a difficulty as to what the order should be, and, because the case did not come within Rules 6 and 7, the Master made the order absolute. I think he put a too narrow construction on those Rules in refusing to hear a suggestion from any one but the garnishee. In my opinion, this appeal should be allowed, and Roberts, having got the money with notice that it was not Death's, should be ordered to pay on it into Court to abide the event of an inquiry whether it is trust-money or not."

In my opinion this appeal should be dismissed with costs.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

MUNROE v. BEISCHEL.

Principal and Agent—Agent's Commission on Sale of Land—Purchaser not Found by Agent—Contract for Payment of Commission—Sale Effected at Lower Price—Assistance in Closing Sale—Remuneration—Quantum Meruit.

Appeal by defendant from judgment of NEWLANDS, J., ante 63, in favour of the plaintiff for the recovery of $320 in an action for commission or compensation for the sale by the plaintiff for the defendant of a section of land.

The appeal was heard by WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.

F. W. G. Haultain, K.C., for defendant.
N. Mackenzie, K.C., for plaintiff.

WETMORE, C.J.:—The defendant wrote the plaintiff a letter dated 7th December, 1906, which was as follows: "I enclose you herewith description of my home farm, which I am offering for sale. I will take $28 per acre net to me. This gives you $2 per acre to work on, which would make you a commission of $1,280. Should have prospective buyer for same, bring him over, and I will make a few extra inducements to close deal."

With this letter he enclosed a document, which I suppose would be in the nature of an advertisement, in which he stated the terms of the sale, that the price was $30 per acre, and that he would leave some hay, oats, and wheat to seed the farm.

The plaintiff asserted that he obtained one Henry Crocket as the purchaser of this section, and that he was, therefore, entitled to commission or compensation. The case was tried before my brother Newlands, and he found that the plaintiff did not establish that he obtained Crocket as such purchaser. That finding, to my mind, disposes of the plaintiff's right of action as set forth in his statement of claim or in any proposed amendment of it. His whole claim is based on the alleged fact that he procured a purchaser of the land or effected the sale of it; he did not do one or the other. He also found that Crocket was in correspondence with the defendant about this land before the plaintiff had anything to do with him, and that he (Crocket) sent his son down where the property was located to look at it, and afterwards went down for the same purpose himself. This finding is fully warranted by the evidence. The learned trial Judge also found that the plaintiff did something towards selling the land, that he shewed it to both Crocket and his son, and in that way assisted at the sale, and that the defendant recognized this in asking the plaintiff to bring him over to Weyburn to complete the sale. The property as a matter of fact was sold to Crocket, and it is quite clear that when both Crocket and his son went to Fillmore, near to which place the land is situated, the plaintiff drove them out to see the land. The plaintiff when he drove Crocket [illegible] was aware that he had been in communication with [illegible] and as a matter of fact he had been in communication with [illegible] for some time prior to that date. I cannot find that the evidence established that the defendant [illegible] in this respect [illegible] Crocket over to Weyburn to complete the sale. The facts [illegible] these. After [illegible] the plaintiff wired the defendant as follows: "Mr. Crocket to inspect farm. [illegible] close to-morrow." [illegible] as follows: "[illegible] Crocket to [illegible] signed—The [illegible]

secretary of that company, the defendant being a member of it. I am of opinion that the defendant recognized the right of the secretary to send this telegram by his letter of 17th June, in answer to the plaintiff's letter claiming payment for his services, and in which the defendant gives as an excuse that he could not get the plaintiff to bring Crocket over "as per my request." That must have reference to the telegram in question, but it also is in accord with the agreement of 7th December, by which it was arranged that if a prospective buyer was obtained the plaintiff was to "bring him over," that is, to Weyburn. The telegram, therefore, does not carry the agreement one step further; it only requested the plaintiff to do what he had agreed to do under his original agreement, and I am at a loss to see how it can be construed into an implied promise on the part of the defendant to pay for services that were entirely outside of the agreement. After Crocket arrived at Weyburn the defendant sold him the property for $17,000, and threw in a quantity of grain and some few agricultural implements, besides, worth a little over $200. Figuring on the acreage, therefore, he sold the property, including the grain, at about $26.25 an acre. I cannot find any evidence that the plaintiff did anything whatever at the defendant's request, implied or otherwise, towards bringing the sale about; he did not introduce the purchaser to the defendant or bring them together. Crocket was in negotiation with the defendant before ever the plaintiff saw him, as I have already stated. As a matter of fact, even before young Crocket had gone down, his father had corresponded with Beischel with respect to this property, and in consequence of a letter received from him had sent his son down to inspect it. So the whole question narrows down to this, in so far as Munroe's services in connection with the actual sale that took place are concerned; that when these Crockets arrived at Fillmore he drove them out to see the farm, and, in so far as the elder Crocket was concerned, he drove him out to see another farm first. I do not mention this latter fact as having any particular bearing on the case, beyond this, to point to the fact that the elder Crocket was not driven by the plaintiff expressly with the view of looking at the defendant's property: he was driven out in the course of the general business that the plaintiff was carrying on, and what he did would be quite in keeping with an endeavour to carry out the contract which was entered into between

him and the defendant by the letter of 7th December; and during all this time the plaintiff was endeavouring to effect a sale at $29 per acre, clearly for the purpose of realizing the dollar an acre over and above the $28 mentioned in the letter last referred to. I am of opinion that the plaintiff is not entitled to recover anything in this action; first, because he was not instrumental in bringing the parties together or in bringing about the sale, as I have before stated; secondly, his employment was by virtue of a special contract, and was of a character which prevented his recovering anything at all, either by way of commission or compensation or on a quantum meruit, unless he obtained a purchaser on the terms specified in that letter. It is clear he did not do that. He did not secure a purchaser for an amount exceeding $28 an acre, and by that letter he was only to be paid for his services what he could sell the land for over and above that price; at any rate unless some new contract was made, either expressly or by implication, which would entitle him to sell at a lower figure, and that was not the case here.

These questions with respect to commission have been very lengthily discussed in a great number of decisions; I do not purpose in this case to go through them to any great extent, but in very many of them what was laid down by Lord Watson in Toulmin v. Miller, 58 L. T. 96, has been referred to as correctly stating the principles upon which commission or compensation can be recovered. He states as follows: "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations." In that case it would seem that, the agent having done his work, and the principal having accepted the benefit of that work, the agent is entitled to be paid; and, in my opinion, a great many of the cases cited on behalf of the plaintiff were cases of that character. Lord Watson goes on in the same case: "On the other hand, suppose

a proprietor goes to an agent for the purpose of letting, and instructs him to let. The agent then says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent. In my opinion, it would merely give him a limited mandate to sell for the price specified, instead of letting." Here the defendant writes the plaintiff that he will take $28 an acre for his land, that that would give the plaintiff $2 per acre to work on, and on which he could make a commission of $1,280. I am of opinion that he practically states in a letter of that sort, "I will not pay any commission unless I can get my property sold to net me $28 an acre." I am quite aware that that is at variance with what was laid down in Aikens v. Allen, 14 Man. L. R. 549. I am free to confess, however, with all due deference to the opinion of the learned Judges who decided that case, that I concur in the view expressed by Perdue, J. I may just add that I do not feel it necessary to discuss this question any further, because I am of opinion that, so far as this case is concerned, the matter is disposed of by the first ground upon which I put my judgment.

In my opinion, the judgment of the learned trial Judge should be reversed, and judgment entered for the defendant with costs.

PRENDERGAST and JOHNSTONE, JJ., concurred.

LAMONT, J.:—In his judgment in the Court below the learned trial Judge found as a fact that the plaintiff did not procure the purchaser for the defendant's land, but that the defendant and the purchaser had been in communication before the plaintiff came into contact with the purchaser. This fact, to my mind, prevents the plaintiff from recovering commission under his written agreement with the defendant. The learned trial Judge, however, also found as a fact that the plaintiff, by shewing the land to the purchaser's son and subsequently to the purchaser himself, assisted in the sale, and that the defendant recognized these services. This finding is, in my opinion, amply borne out by the evidence. It is admitted that the plaintiff shewed the purchaser and his son over the land and tried to get them to purchase; as soon as he returned from shewing Crocket the land he telegraphed to the defendant that

he had Crocket there, and to come over and help close the deal. The defendant being away at the time, his bookkeeper telegraphed as follows: "Weyburn, Sask., 29, 1907. Wm. Monroe, George not home, coming to-night. Have Mr. Crocket to Weyburn to close deal. Answer. The Weyburn Implement Co."

The plaintiff did not take Crocket to Weyburn, but he again wired the defendant to come to Fillmore, to which the defendant replied that he was sending word by Alois. Alois, who was the defendant's brother, came over, and without any word of their intention to the plaintiff, Alois and Crocket hired a team and drove to Weyburn and closed the deal.

If the bookkeeper was acting with authority in sending his telegram of the 29th, that, in my opinion, is a recognition by the defendant of the services of the plaintiff. That he had authority to send that telegram, or that his act in sending it was subsequently ratified by the defendant, is to my mind established by the defendant's letter of 17th June, which is as follows:—

"Mr. William Munroe, "Weyburn, Sask., June 17, '07.
"Fillmore, Sask.

"Dear Sir,—In reply to yours of recent date re the sale of 19-10-11, will say that I do not think you are entitled to a commission on that sale, as it was me that got him here in the first place, and from what I have learned you tried very hard to sell him some other land, and in fact could not get you to bring him over as per my request.

"Yours truly, Geo. Beischel."

Here the defendant says that because the plaintiff did not bring the purchaser over to Weyburn, as requested by him, he is not entitled to commission. The only request made was the telegram of the bookkeeper, which the defendant in this letter refers to as his own. There is, however, direct evidence not only that the defendant recognized that the plaintiff had rendered services and had incurred expense on his account, but also an explicit statement that he would pay for them. In Mr. Crocket's evidence, where he was asked as to what took place at his interview with the defendant at Weyburn, the following appears:—

"Q. Just state the conversation that took place between Beischel and you.

"A. We talked over the price of the farm, and defendant offered it to me then for $28 an acre. I didn't buy

that night. I think it was the next morning I bought it for $17,000.

"Q. Was Munroe mentioned in the matter?

"A. I said I had been out with him, and there was a few telegrams there, and I didn't know who ought to pay it. He said, 'I will pay them myself." I thought he was entitled to pay it because I thought I ought to telegraph."

Here Crocket pointed out to the defendant that he had been out to the land with the plaintiff, and there were some telegrams which the evidence shews the plaintiff had paid, and raised the question as to who should pay for them, and the defendant said he would pay them himself. Pay whom? There was no one to pay but the plaintiff. The services here that are expressly recognized are the taking of Crocket out to inspect the land and the sending of the telegrams. There is, therefore, evidence, in my opinion, to justify the learned trial Judge in finding that the plaintiff assisted in the sale, and that the defendant recognized these services and should pay for them.

One of the grounds of appeal taken by the defendant, although not mentioned in the factum or urged at the hearing, was that if the plaintiff was entitled to any remuneration for his services, the amount allowed by the learned trial Judge was excessive. On this point I agree with the defendant. The chief service rendered by an agent in selling land on commission is the procuring of a purchaser, the service rendered in shewing him over the land being of minor importance. Here the plaintiff did not find the purchaser, and his remuneration should be limited to the amount the actual services he rendered would be worth. In my opinion, $75 would be a sufficient remuneration for his services and expenses, and I would reduce the judgment to that amount.

YUKON TERRITORY.

CRAIG, J. JULY 4TH, 1908.

TRIAL.

YUKON TRUST CO. v. POPICH.

Landlord and Tenant—Action for Rent—Surrender of Premises—Operation of Law — Acceptance — Delivery of Key—Subsequent Renting of Premises.

Action by landlords against tenant for rent.

Frank J. McDougal, for plaintiffs.

F. T. Congdon, K.C., for defendant.

CRAIG, J.:—The defendant was the tenant of the plaintiffs under a lease providing for a two years' term commencing on the 21st March, 1907, rent payable monthly on the 1st of each month. Prior to 16th March, 1908, the defendant sued the plaintiffs for disturbance of his quiet enjoyment. Part of that cause of action was interference with a kitchen range. The action was settled by agreement of that date, and the plaintiffs released the defendant from the payment of rent for the months of November, December, 1907, and January, February, March, and April, 1908, the consideration for the release being the surrender to the plaintiffs of certin plate glass windows and double doors and the discharge of the action for damages, the defendant agreeing to continue as tenant under the lease. The defendant in his evidence on the trial of this cause says that in the negotiations leading up to the settlement, the damages were estimated at $150, which would be the amount of the rent for April. But it is not clear whether that was in lieu of rent or how. However, they started at that date with all the rent released by the agreement, and the defendant discharged the plaintiffs from the action for damages, agreeing at his own cost and expense to repair the damage for which the action was brought. After that and on 22nd April the defendant handed to Jenneret, the agent of the plaintiffs, the key of the premises, saying he was going out and could not afford any longer to continue the business. Nothing was said about a surrender, no release asked for or given. A week before 1st May the agent of the plaintiffs handed the key to a prospective tenant to go in and view the premises, he (Jenneret) leaving for a trip and not returning until 1st June, at which time he re-let the premises, the prospective tenant having the key in his possession all this time.

It is contended by the defendant's counsel that there can be no recovery for April, the rent therefor being surrendered by actual agreement, and there being nothing in the agreement in the nature of a covenant by the defendant to pay that rent or any sum in lieu of it, or in substitution for the damages. I think the defendant's contention must prevail for this month. All that the agreement amounts to is a surrender by the defendant of his action for damages and a cross-surrender by the plaintiffs of their claim for rent in lieu of the surrender or as a consideration for the surrender or discharge of the action for damages. The plaintiffs' contention that because the defendant was to repair at his own

cost, and has not done so, he is therefore rendered liable for the rent, I think cannot stand. It was the defendant's own property; the range which was disturbed he could or could not, as he saw fit, repair. He could remove it and did remove it before tendering the key; the company have sustained no loss by his non-repairing, because any repairs which he might have made would not inure to their benefit, but to his, and only so long as he was a tenant of the premises. There is nothing in the agreement by which he covenants to repair for the benefit of the plaintiffs, the landlords, or to maintain the premises in good repair for their benefit, in connection with the range or anything else. Therefore, I think the company cannot recover for that month.

Then, as to the month of May, the rent for which was due on 1st May, and was demanded on that date by the agent for the company, as is admitted by both parties, the defendant in answer to the demand for rent saying he owed nothing and would not pay. It is argued that the delivery of the key and the subsequent renting of the premises creates a surrender by operation of law. I cannot infer any intention on the part of the plaintiff company to accept a surrender, and I see no act of theirs inconsistent with their still claiming the rent from the defendant. Their allowing a prospective tenant to go in is not such an acceptance of the premises as amounts to acceptance of a surrender and does not create a surrender, to my mind. The case of Oastler v. Henderson, 2 Q. B. D. 575, I think, is conclusive upon the matter, and that case reviews most of the cases relied upon by counsel for the defendant in support of his contention for the surrender, namely, Grimman v. Legge, 8 B. & C. 324, 32 R. R. 398; Whitehead v. Clifford, 5 Taunt. 518, 15 R. R. 579; Dodd v. Acklom, 6 Man. & G. 672, 64 R. R. 839; and Mollett v. Brayne, 2 Camp. 103, 11 R. R. 677. And there are also the cases of Carpenter v. Hall, 16 C. P. (Ontario) 90, where it was held that neither the giving up of the key nor the abandoning of the possession would of itself have been a surrender in law; and Ontario Industrial Loan and Investment Co. v. O'Dea, 22 A. R. 349, where it was held that acts relied on as shewing the acceptance by the landlord of the surrender or the release and as effecting the surrender by operation of law must be such as are not consistent with the continuance of the term, and using the key left by the tenants at the landlord's office, putting up a notice that the premises are to let, making some trifling repairs, and cleaning the premises, are ambiguous

acts which are not sufficient for his purpose. Language very similar in effect is used by the Judges in the case of Oastler v. Henderson, where Cockburn, C.J., and Bramwell and Brett, JJ., concur in holding that the delivery of the keys to the agent and the attempt by the landlord to obtain another tenant, and the entry even by the landlord for a short time to put up bills and advertising the premises, are not such acts as create a surrender by operation of law.

There will, therefore, be judgment for the plaintiff for $150, and costs on that scale.

YUKON TERRITORY.

JULY 14TH, 1908.

FULL COURT.

IRWIN v. KELLY.

Contract — Purchase of Interest in Mining Property — Payment of Money — Failure to Convey — Action to Recover Money Paid—Defence—Novation—Substitution of Debtor —Release—Absence of Writing—Statute of Frauds—Evidence.

Appeal by defendant from the judgment of CRAIG, J., ante 95.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. T. Congdon, K.C., for defendant.

Frank J. McDougal, for plaintiff.

MACAULAY, J.:—This is an appeal from the judgment of Craig, J., dated the 10th day of April, 1908, who found in favour of the plaintiff.

There were really only two points on appeal before us. The first contention raised by the appellant was that there was a novation between the parties, and that the plaintiff had released the defendant and accepted one Heydon in his place as her debtor.

The evidence in this case was very conflicting, and the learned trial Judge expressed himself as not giving credence to the testimony of any of the parties. The novation agreement that the appellant endeavours to set up is an oral one, and is stoutly denied by the respondent. There is no writing evidencing any agreement between the parties,

and under those circumstances it would be impossible for me to come to the conclusion that any novation agreement had been entered into between them.

I have read the evidence carefully, and, had not the trial Judge expressed himself so strongly in regard to it, I would have still remained of the same opinion in regard to the novation that I now entertain, because I would have been inclined to have believed the evidence of the plaintiff, especially as against the evidence of Heydon, who was, apparently, an educated man, and who produced written statements of his own dealings with the plaintiff which did not bear out the construction he contended should be placed upon them; and it seems to me that the plaintiff, who was an illiterate woman, had been taken advantage of by both the defendant and Heydon.

The other point that was raised in the case was the contention by the appellant that the plaintiff could not succeed in the action in its present form, and in support of such contention the case of Hunt v. Silk, 5 East 449, was cited.

The plaintiff never was in possession of the claim in question in this action, and consequently does not come within the authority of Hunt v. Silk, in my opinion, but rather comes within the authority of some of the cases cited in that judgment.

Not having been in possession of the property, I am of the opinion that she is entitled to succeed in this action in its present form, and consequently that this appeal should be dismissed with costs.

DUGAS, J.:—I agree that this appeal should be dismissed. With the conflict of evidence, I cannot see how we could find any legal proof of a novation which would have the effect of discharging the defendant (appellant) of his obligation towards the plaintiff (respondent), and of making Heydon her sole obligor in his stead.

As to the nature of the action, I think it was properly taken, in view of the fact that there was no consideration whatsoever for the money paid to the appellant by the respondent. The appellant had no title to the claim. He did not, and could not, pass any right whatsoever in it. He never put himself in a position to do so, either before or after demand, and even lost, by lapse of time, his right to acquire from McDonald.

I am, therefore, in favour of having this appeal dismissed with costs.

THE

Western Law Reporter

VOL. VIII. TORONTO, SEPTEMBER 15, 1908. No. 11

BRITISH COLUMBIA.

JUNE 24TH, 1908.

FULL COURT.

REX v. WALKEM.

Criminal Law—Indictment for Counselling or Procuring the Commission of an Indictable Offence — Evidence that Offence to be Committed in a Foreign Country—Mistrial —New Trial — Admissibility of Evidence — Sufficiency —Corroboration.

The indictment against the accused upon which he was tried before CANE, Co.C.J., contained two counts:—

1. That George A. Walkem in or about the month of February, 1907, at the city of Vancouver, in the province of British Columbia, did counsel or procure one Blanche Bond, of the city of Vancouver, aforesaid, a single woman, to commit an indictable offence, to wit, the said Blanche Bond then being in child by the said George A. Walkem, to unlawfully permit to be used on her a certain instrument or other means with intent to procure the miscarriage of the said Blanche Bond.

2. That the said George A. Walkem, at the city of Vancouver, in the month of February, 1907, did unlawfully supply one Blanche Bond, a single woman, then being with child by the said George A. Walkem, with a certain drug, to wit, "ergot," knowing that the same was intended to be unlawfully used by the said Blanche Bond with intent to procure a miscarriage.

Upon this indictment the accused was tried, and convicted upon both counts.

The Judge reserved the three questions following for the opinion of this Court, pursuant to sec. 1014 of the Criminal Code, 1907, viz.:—

1. Is counselling a person in Canada, as charged herein against the accused, to submit in the United States to an abortion, by an instrument or other means, an offence against the criminal law of Canada, the person counselling and the person counselled being in Canada when said counsel was given?

2. Is there any corroboration whatever of the evidence given in this case by the woman to whom the drug ergot is alleged to have been supplied, and upon whom the abortion is alleged to have been performed, she being a consenting party to the taking of said drug and the performance of said abortion?

3. Was sufficient evidence given that any drug or noxious thing was supplied to said woman by the accused with intent to procure her miscarriage?

At the same time leave was given to the accused to apply to the full Court for a new trial, pursuant to sec. 1021 of the Code, on the ground that the verdict was against the weight of evidence.

The case was heard by HUNTER, C.J., MORRISON and CLEMENT, JJ.

Martin, K.C., for the accused.

Maclean, K.C., for the Crown.

CLEMENT, J.:—This case comes before us upon a reserved case stated by Judge Cane, in these words (setting out as above.)

His Honour also gave leave to the accused to apply to this Court under sec. 1021 of the Criminal Code for a new trial, on the ground that the verdict was against the weight of evidence; but, for reasons which will appear later, it is unnecessary to deal with that aspect of the case, or to express any opinion upon the question whether or not it is within our power to entertain such an application upon the ground of discovery of fresh evidence.

So far as concerns the reserved case, the matter is put before us in a somewhat unsatisfactory shape. There was evidence before the learned trial Judge to the effect that the accused counselled the young woman to submit to an operation for abortion at Nanaimo, but it would appear from

the first question reserved (and indeed the learned Crown counsel did not contend otherwise) that the verdict was not based upon this evidence. But it was strongly urged that, no matter what our view might be upon the second question, the verdict should stand because the trial Judge really convicted, as he might, upon the evidence of the young woman, apart from any corroborative testimony. It seems to me that, as the power and duty imposed upon a trial Judge is to reserve a question of law "arising" upon the trial, we must assume that a decision one way or the other upon such question was material to the determination of the larger question of the guilt or innocence of the accused. We cannot, in my opinion, listen to the suggestion that the question is one of academic interest merely. In view of the result at which I have arrived, it is unnecessary to pursue the matter further than to say that a trial Judge should not grant a reserved case upon a question the determination of which either way would not and did not affect his conclusions.

The first question must, in my opinion, be answered in the negative. The learned counsel for the Crown cited Rex v. Higgins, 2 East 5, and Rex v. Cole, 5 Can. Crim. Cas. 380, to which I may add Rex v. Gregory, 36 L. J. M. C. 60, as authority for the proposition that it is a misdemeanour at common law to counsel or incite to the commission of a crime, without regard to whether the crime counselled was or was not actually committed; arguing therefrom that the fact that, as here, the act alleged to constitute the counselled crime was committed abroad, and was not, therefore, a crime of which our Courts could take cognizance, went no further to relieve the accused than if the act counselled had never been committed at all. In my opinion, the cases do not touch the real point which this first question raises. They are all cases in which the act counselled was to be performed, if performed at all, within the jurisdiction, that is to say, what was counselled was the commission of an offence against the law of the land, or, to follow the usual phrase, "against the peace of our Lord the King, his Crown and dignity."

We were referred to no case in which the real point here involved was discussed: but I find the matter dealt with by a very weighty authority, Sir James Stephen, in his History of the Criminal Law (1883), at p. 12, as a question of the greatest importance and delicacy which has never yet

been judicially decided. He propounds the question in this way: "How far are acts committed abroad, which if committed in England would be crimes, recognized as crimes by the law of England for the purpose of rendering persons in England criminally responsible for steps taken in relation to them, which, if taken in relation to crimes committed in England, would make them accessories to commit it?" And he puts this case: 'A, in England, advises B to commit a robbery in France, and supplies him with the means to do so. Is A. an accessory before the fact if the robbery is committed, and is he guilty of inciting B. to commit a crime if the robbery is not committed?" Sir James Stephen entirely refrains from giving a decided opinion upon the point, but a perusal of what he has written leaves very little doubt in my mind that he would answer the question as I have answered it. He says: "I do not think it proper to give a decided opinion upon this subject, because it is by no means unlikely to be raised judicially, but I will make one or two observations upon it. One strong argument against the criminality of such acts is that the law of England does not deal with crimes committed abroad at all. The law of England does not forbid a Frenchman in France to rob another Frenchman in France. The argument on the other side is that in all common cases it would be highly expedient that all civilized countries should recognize offences committed in each others' territories as offences for the purpose in question. But to this it may be replied that this is an argument for the legislature and not for the Judges.

His statement that "the law of England does not deal with crimes committed abroad at all" agrees with the oft-quoted and never questioned saying of Lord Chief Justice De Grey in Rafael v. Verelest, 2 W. Bl. 1058: "Crimes are in their nature local, and the jurisdiction of crimes is local. What takes place abroad cannot, in the eye of our law, be an offence against our law (unless indeed made so by statute), except in the one well known case of piracy jure gentium:" Kenny, Outlines of Criminal Law, 411; Story, Conflict of Laws, sec. 620; Bishop, Crim. Law, 7th ed., secs. 109, 111; Regina v. Bernard, 8 St. & Tr. N. S. 887, 1 F. & F. 240; Regina v. Kohn, 4 F. & F. 68; and see also Huntingdon v. Attrill, [1893] A. C. 150, per Lord Watson at p. 156.

I also find the point referred to in Kenny, Outlines of Criminal Law, at p. 413. He says: "Doubt has arisen as to whether, even when a man is in England, he could

commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad. For, as "English Courts have no official knowledge of foreign law, they cannot be sure that an act, however wicked, is actually a crime by the law of the particular foreign country concerned." The argument thus advanced by the learned author does not, I must confess, appeal to me as at all conclusive, for, if the difficulty is one of proof merely, that may be met. The question is not whether what is counselled is or is not a crime in the eye of the foreign law. It cuts deeper—is it an offence against our law? To which, after anxious consideration, I would give the answer that nothing beyond our borders can be an offence against our law unless made so by statute; and to counsel the commission of an act abroad is not to counsel the commission of an offence against our law. The fact that there has been such legislation in several instances (see Stephen's Hist. of the Crim. Law, p. 14) of course strengthens the argument.

By sec. 1018 of the Criminal Code, the Court of Appeal may, if of opinion that the ruling was erroneous and that there has been a mistrial in consequence, order a new trial. I am clearly of opinion that the ruling upon the point just discussed was erroneous; and, after careful perusal of the evidence, am also of opinion that there was in consequence of that erroneous ruling a mistrial on both charges. The ergot incident, if I may call it so, was one alleged criminal step in a long story of crime, the whole of which came out in evidence. In view of the fact that there is to be a new trial, I refrain from saying anything to prejudice the result, but manifestly there are serious questions as to the admissibility of much of the evidence given at the first trial, if the inquiry is to be limited, as of course it must be limited, to the question of the guilt or innocence of the accused in reference to counselling acts to be done in Canada. Those questions have not been argued before us, and I offer no opinion upon them. The trial having proceeded upon both counts together, it was not open to the accused to raise such questions, particularly in view of the ruling upon the larger point already discussed. That to some extent this was the fault of the accused in not asking for a separate trial upon each count of the indictment can hardly be seriously urged as a reason for refusing a new trial, if we are of opinion that there really was a mistrial. Here there were what may

be fairly termed a major and a minor charge; and, in my opinion, the trial of the major charge was proceeded with under such fundamental error affecting the whole case that justice can be done only by directing a new trial upon both charges.

HUNTER, C.J., concurred.

MORRISON, J.:—The facts, as substantially found by the learned Judge, were that Blanche Bond was with child by the accused, to the knowledge of the accused, and at a critical stage of pregnancy he advised certain treatment, and administered ergot pills to her with a criminal intent. Both these expedients having failed, he then counselled her to go to a certain town within the province to have a criminal operation performed upon her. This she refused to do. There is nothing in the proceedings at the trial as placed before us to preclude the opinion on our part that the learned trial Judge relied upon that evidence in finding the accused guilty on the first count of the indictment. That the criminal act was not committed as counselled, or at all, does not avail the accused. When a person with criminal intent solicits or advises another to commit an offence which the other does not commit at all, such soliciting, by whatever means it is attempted, is an act done, and that such an act done is punishable by indictment has been clearly established; Leblanc, J., in Rex v. Higgins, 2 East 22. "It would be a slander upon the law to suppose that such an offence is not indictable:" Lord Kenyon, C.J., at p. 17.

This brings me to that part of the evidence which relates to what happened in the United States, following the counselling to proceed there for the purpose of commiting a criminal act, and which was shortly subsequent to the counselling as to Nanaimo.

It is indisputable that the laws of Canada can have no force or effect proprio vigore in a foreign country, in this case the United States. And it has been urged upon us that all the evidence as to what took place in Seattle, Tacoma, and Portland is irrelevant and inadmissible, and its reception has brought about an illegal trial, a conviction arising out of which cannot stand.

With deference, I submit that having regard to this particular trial, the evidence is relevant and admissible as going to prove guilty knowledge or intention as well as to shew her condition of health. The tendency of such evidence is to prove and to confirm the proof already given that Blanche Bond was enceinte by the accused. It is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony. Although conduct on other occasions is never admissible to prove the actus reus, it is admissible to prove the mens rea: Regina v. Giering, 18 L. J. M. C. 215.

Viewing the evidence as a whole and in every sense, there is a nexus between the several acts in respect of which the evidence was elicited.

In Rex v. Ellis, 6 B. & C. 145, Bayley, J., said: "I think it was in the discretion of the Judge to confine the prosecution to the proof of felony, or to allow him to give evidence of other acts which are all part of one entire transaction. All the evidence in this case tended to shew that the prisoner was guilty of the felony charged in the indictment."

A transaction may be a continuous one extending over a long period. In such case any words or statements accompanying such continuous transaction at any time during its continuance are admissible as part of it: Rawson v. Haigh, 2 Bing. 99.

Coming to the second question, dealing with corroboration. Upon the trial of a charge of this kind the law does not require corroboration. The conviction here cannot be quashed for want of corroboration. There is a clear distinction between corroboration required by law and that required as a rule of prudence or procedure. In the former case a conviction on uncorroborated evidence would be illegal, whereas in the latter case it would be perfectly valid: Rex v. Stubbs, 25 L. J. M. C. 16. But counsel contend, inasmuch as the learned Judge stated that he found corroboration, that he would not have convicted in its absence, and he proceeded to shew that there is no evidence whatever of corroboration. The transcript of the discussion of the question of corroboration between counsel and the learned Judge does not sustain this contention.

This is how it terminated:—

"THE COURT:—I am not going to put corroboration in there, because the law does not require it.

"MR. MARTIN:—But you have required it.

"THE COURT:—I have not, but I have found it for my own satisfaction here, which makes it stronger in my mind. I will put in 'corroboration,' but I will tell you I do not think it should be there at all."

As to the third question, it has been held that if a man believes a drug to be a noxious drug and incites a woman to take it, he is guilty of attempting to procure abortion by incitement, although as a matter of fact the commission of the offence by the woman is impossible in the manner proposed.

In statutory enactments an appeal from the verdict of a jury on the facts was practically unknown; the exception being when a misdemeanour was tried by the King's Bench. A new trial was granted to a convicted person because the criminal trial being held by a Court of civil jurisdiction, the prisoner should have the benefit of civil procedure. Though our Code expressly provides for such an appeal, yet in such appeals we are bound by the authorities extant in civil cases.

Lord Ashbourne in Guildhall v. General Steam Navigation Co., [1908] A. C. 161, said: "I think the cases should be very rare indeed. I can conceive few cases, where I would do it myself—where I would sanction or encourage an appeal on questions of fact which had been fully thought out and examined by the Court of first instance."

Applying those principles to this case, how can it be successfully contended that the learned trial Judge convicted against the weight of evidence—especially when it is remembered that there was no jury, and that he gave a considered decision? On the whole case as submitted, I think it should be referred back to the learned trial Judge for amendment or restatement under sec. 1017, sub-sec. 3. And, whilst I think that question (1) is hypothetical, and question (2) if answered in the negative would not carry the matter any further, being in no way binding on the Judge, nor affecting in any way the conviction, yet I venture to think that the authorities sustain the contention that the act done of counselling is an indictable offence by common law, regardless of where the crime counselled is committed.

The common law jurisdiction as to crime is still operative, even in cases provided for by the Code, unless there

is such repugnancy as to give prevalence to the latter law: The King v. Cole, 5 Can. Crim. Cas. 330.

The Code is merely declaratory of the common law. It does not displace it. That was the intention of the English draft Criminal Code—to sweep away the common law and make all crimes statutory offences. Doubtless that was the reason it did not receive legislative sanction. In Stephen's Criminal Law of England the learned author treats the phase of counselling as embodied in question 1, opposing his own doubt and views to the authorities then extant, with a scrupulousness which, if given the force of law, would be less than justice. The uncertainty of views there raised seemed to be adopted by later text writers, but, as has been said, text books are written en suite, and a mere repetition by subsequent writers does not necessarily make their dicta law.

Subject to the above observations, I would answer all the questions submitted in the affirmative. And as to the application for a new trial I would refuse it. All the more so having regard to sec. 1019 of the Code, which enacts that no conviction shall be set aside nor any new trial directed, although it appear that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial; as well as having regard to the power reposed in the Minister of Justice to review the whole proceedings in case of a conviction and sentence, particularly where there is a question of new evidence involved. The Court, at any rate, should be most careful not to substitute themselves for the jury nor to be astute to invade the functions of the trial Judge when acting as a Judge and jury.

New trial ordered: MORRISON, J., dissenting.

[An application made to the Judicial Committee of the Privy Council for special leave to appeal was refused.]

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

HUGGARD v. ONTARIO AND SASKATCHEWAN LAND CORPORATION.

Vendor and Purchaser — Contract for Sale of Land — Lien for Unpaid Purchase Money—Cancellation of Contract—Release of Purchasers—Agreement—Delivery—Escrow—Fraud and Misrepresentation—Appeal—Question of Fact.

Appeal by plaintiffs from judgment of NEWLANDS, J., 6 W. L. R. 645.

Norman Mackenzie, K.C., for the plaintiff Huggard.

C. P. Fullerton, Winnipeg, for the plaintiff Corelli.

A. E. Hoskin, Winnipeg, and W. M. Martin, Regina, for the defendant company and the defendants Hambly, Maude A. Scott, and C. D. Scott.

A. L. Gordon, Regina, for the defendant Aird.

The judgment of the Court (WETMORE, C.J., JOHNSTONE and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—This is an appeal from a judgment of my brother Newlands. The plaintiffs and J. T. Scott and the individual defendants, other than the defendant Aird and the defendant company and Maude A. Scott (who is the administratrix of J. T. Scott), through one Smith and others, acquired the right to purchase certain lands, the property of the Canadian Pacific Railway Company, for the sum of $4 per acre. The defendant company were organized apparently for the purpose of acquiring from these persons the rights which they had in these lands, for which they were to pay $5.25 per acre. The Canadian Pacific Railway Company and the defendant company entered into agreements for the sale and purchase of these lands at $4 an acre, to be paid to the Canadian Pacific Railway Company, part of which was to be paid in cash and part by instalments extending over 5 years, with interest; and it was provided in the

contracts that if the payments were not made within the times limited respectively, or if the defendant company failed to carry out in their entirety the conditions of the contracts, the railway company should have the right to declare the contracts null and void, and that the premises agreed to be sold should revert to and revest in the railway company; and it was declared that these conditions and stipulations were conditions precedent and of the essence of the contracts. These contracts, I may say, were dated 30th June, 1903. On the same date (30th June, 1903) the defendant Aird and the defendant company entered into agreements, whereby it was recited that one Smith and others had entered into an agreement with the defendant company for the sale to them of the lands at the price of $5.25 an acre, payable as follows: the defendant company to assume and pay to the Canadian Pacific Railway Company the sum of $4 per acre, being the full purchase price to the said railway company, together with 10 per cent. per acre survey fee, and that the balance of the unpaid purchase money owing to Smith and others, amounting to $1.15 per acre, was to be paid in the manner thereinafter set forth, the effect being that the defendant company were to pay $4.10 an acre to the railway company, and the balance, amounting to $1.15 an acre, to Smith and others. It then recited a transfer from Smith and others to Aird, and it was agreed that the balance that remained per acre was to be paid to Aird by instalments extending over 5 years, and that the defendant company should pay the railway company the amount payable from them under their agreement at the times specified for payment; and there was also a provision in these agreements with Aird that on the company failing to make the payments provided for, either to Aird or to the railway company, Aird should have the right to declare the agreements null and void. As a matter of fact Aird was trustee for the plaintiffs, and J. T. Scott, and the other defendants except the company and Maude A. Scott, and hereafter in this judgment I shall call these persons "the syndicate." I have not set forth all the facts at length, because they are very voluminous, they depend largely on documentary testimony, and they are of a very intricate character, in my opinion. I have set forth all that I consider material to the point on which my decision rests. There seems to have been a disposition among the members of this syndicate to keep their names out of sight

as far as they could; in fact, I cannot find that their names appear in any formal document except one, and that was a document dated 5th November, 1903, which is as follows:—

"It is hereby agreed by and between the parties hereto, that J. T. Scott shall be entitled to a commission of 5 per centum on the sale price of the lands sold by the parties hereto to the Ontario and Saskatchewan Land Corporation, Limited, W. H. Montague, and the Union Trust Company, Limited, and also to receive out of the said purchase price all payments and disbursements made by him heretofore, or to be hereafter made by him, in connection with the sale of stock of the Ontario and Saskatchewan Land Corporation, Limited, and the trustee for the vendors, Mr. John Aird, is hereby authorized to make the said payments to the said J. T. Scott, from time to time, upon his producing to the said John Aird vouchers, by cheque or otherwise, shewing such disbursements to have been duly made by him, it being understood between the parties hereto that each of them is entitled to a one-eleventh share of the net proceeds, with the exception of Sir D. H. McMillan, who is entitled to a two-eleventh share, and the said John Aird is hereby authorized to make the said division accordingly." This document was signed by all the members of the syndicate.

In this action the plaintiffs alleged that Aird was trustee for the syndicate; that the defendant company had not paid the amounts that they had agreed to pay under the agreements in question; that the defendant company were in insolvent circumstances; that they were negotiating a sale of the lands which would net the company more than $4.75 per acre; that, if the sale was carried through, the plaintiffs would lose their lien against the lands. It was also set up that the price at which the defendant company were negotiating a sale was insufficient, and less than the fair market value of the lands; and that the plaintiffs had requested Aird to cancel the agreements and enforce the lien of the syndicate, and that Aird had refused to do so. They claim a number of reliefs, which, in the view I take of the case, it is not necessary to set out. The defendants C. D. Scott, Hambly, Maude A. Scott, and the company, appeared and filed a statement of defence. Aird also appeared and submitted to the order of the Court. The defendants McMillan, Watson, Vokes, and Arbuthnot, filed no defence apparently. The defendants who appeared, other than Aird, set up two grounds of defence which are

necessary to refer to. One is that the plaintiffs released their claim under the agreements in question, and the other is that the plaintiffs were promoters of the defendant company, and purchased the lands as such promoters, and as such occupied a fiduciary relationship with regard to the defendant company, and are therefore precluded from making any profit from the dealings with such company. All the members of the syndicate (of course, including both the plaintiffs, and also Maude A. Scott) executed a release, under seal, dated the 13th February, 1905, which is as follows:—

"To all to whom these presents may come, be seen, or known, greeting.

"Whereas by two certain indentures bearing date the 30th day of June, 1903, and made between John Aird, of the city of Winnipeg, in the province of Manitoba, bank manager (acting therein as trustee for the following parties, namely, Sir D. H. McMillan, The Honourable Robert Watson, John Arbuthnot, C. Vokes, J. T. Scott, J. T. Huggard, George A. Bull, A. H. Corelli, W. J. Hambly, and C. D. Scott), of the first part, and the Ontario and Saskatchewan Land Corporation, Limited, of the second part, the said the Ontario and Saskatchewan Land Corporation, Limited, covenanted and agreed to and with the said John Aird to pay or cause to be paid to him the said John Aird, his heirs, executors, administrators, or assigns, certain sums of money, as therein set forth, on account of the purchase price of certain lands purchased by the said the Ontario and Saskatchewan Land Corporation, Limited.

And whereas by agreement dated the 5th day of November, 1903, and made between the said Sir Daniel H. McMillan, The Honourable Robert Watson, John Arbuthnot, C. Vokes, J. T. Scott, J. T. Huggard, George A. Bull, A. H. Corelli, W. J. Hambly, and C. D. Scott, it was agreed that the said J. T. Scott should be entitled to a commission of 5 per cent. on the sale price of the lands sold to the Ontario and Saskatchewan Land Corporation, Limited, and that each of the said parties was entitled to one-eleventh share of the net proceeds of the money to be paid by the Ontario and Saskatchewan Land Corporation, Limited, to the said John Aird under the provisions of the agreements firstly above mentioned, with the exception of Sir D. H. McMillan, who, it was agreed, was entitled to

a two-elevenths share of the said moneys, and the said John Aird was thereby authorized to make said division accordingly.

"And whereas the said parties have agreed to release all right and claim which they or any of them may have to the payment of any sums of money out of the moneys to be paid by the Ontario and Saskatchewan Land Corporation, Limited, its successors, or assigns, to the said John Aird, his heirs, executors, administrators, or assigns, under the provisions of the said agreement dated the 30th day of June, and to which they or any of them may be entitled under the terms of the agreement dated the 5th day of November, 1903, the estate of the said J. T. Scott, now deceased, being represented herein by Maude Amelia Scott, the administratrix of the said estate.

"Now know ye that we, the said Maude Amelia Scott, administratrix of the real and personal estate of James Turner Scott, deceased, and Sir Daniel H. McMillan, The Honourable Robert Watson, John Arbuthnot, C. Vokes, J. T. Huggard, George A. Bull, A. H. Corelli, W. J. Hambly, and C. D. Scott, do and each of us doth freely and absolutely release and forever discharge all and every claim to payment of any sum of money to us or to each or to any of us out of the moneys payable as aforesaid by the Ontario and Saskatchewan Land Corporation, Limited, its successors or assigns, under the terms of the said agreements bearing date the 30th day of June, 1903, and to which we or any of us may be entitled under the terms of the said agreement dated the 5th day of November, 1903, and so that neither we nor any of us nor any of our executors or administrators at any time hereafter may, shall, or will ask, claim, or demand by reason or means of the said agreement dated the 5th day of November, 1903, or anything therein contained, any right, benefit, or payment in any manner whatsoever out of the moneys payable by the Ontario and Saskatchewan Land Corporation, Limited, its successors or assigns, to the said John Aird, his heirs, executors, administrators, or assigns, under the agreements dated the 30th day of June, 1903, and from all actions, suits, or demands concerning the same, we, and each of us, our executors, administrators, and assigns, shall be utterly excluded and forever debarred by these presents, and that we do and each of us doth further hereby authorize and direct the said John Aird to assign the said agreements

dated the 30th day of June, 1903, to the Trusts and Guarantee Company, Limited, of the city of Toronto, in the province of Ontario, freed and discharged from the claims of each and every of us under the said agreement bearing date the 5th day of November, 1903."

My brother Newlands held that this release barred the right of the plaintiffs to recover. The evidence is of a very conflicting character. The plaintiffs allege that their execution of the release was procured by misrepresentation and fraud on the part of C. D. Scott, who brought the instrument to them for execution. The facts are that the defendant company was not a success, the lands were not being sold as rapidly as was expected, and the president of the railway company was interviewed by Sir Daniel McMillan with a view of getting better terms from him, but without success, and in consequence C. D. Scott, who was acting as secretary for the defendant company, called upon the president of the railway company, and the president refused to alter their contract at the request of individuals, whereupon Scott represented to the president that it was a matter in which a large number of shareholders were interested, who would lose all the money they had invested if the lands were forfeited, and that he (Scott) believed he could secure a release of the individual interests, that is, the syndicate interests, and that the money would go to the shareholders. On that representation the president of the railway company agreed to extend the time and spread the payments over a period of 10 years and give them until the 1st June following to make the first payment; and on this representation Mr. Scott prepared the release as hereinbefore set forth, and procured its execution by the members of the syndicate in the east, and then brought it on to Winnipeg and procured there the signatures of the plaintiffs and of Sir Daniel McMillan and George A. Bull. Mr. Scott swore that at the time this instrument was executed by the plaintiffs he stated distinctly his interview with Sir Thomas Shaughnessy, the president of the railway company, the result of that interview being that an extension of time for payment to the 1st June had been granted, and that after such information the plaintiffs executed the release. Sir Daniel McMillan was present on that occasion, and, while his memory does not appear to be very clear as to what took place, I am of opinion that the general trend of his testimony is corroborative

of Scott's version of what took place. The plaintiffs, however, swore that Scott told them that the railway company were going to cancel the contracts of the defendant company, and, if they did so, the shareholders of the company would lose their money, and, of course, naturally, the syndicate would get nothing, and that he said that "If you (meaning the plaintiffs and McMillan) would release your interests, then the Canadian Savings Company will take over the holdings of the Ontario and Saskatchewan, pay the railway company, and give to the shareholders of the company dollar for dollar of the stock of the Canadian Savings." Scott denies this. It was also stated by the plaintiffs that Scott stated that the railway company were going to cancel, that the Canadian Savings were going to take over the holdings of the company, and that these two agreements were to go before the shareholders of both companies, and, if they did not go through, the document (that is, the release) would be destroyed. Scott denies this also. In both these denials Scott is corroborated by Sir Daniel McMillan, and more clearly than in the other matter of corroboration.

The learned trial Judge has found the facts surrounding the execution of this release by the plaintiffs in accordance with the testimony of Scott. Now, in case of appeal on questions of fact, the appellate Court may reverse the finding of the trial Judge, but I think it is well conceded that that will not be done unless the facts are of such a character, first, that the conduct or appearance of the witnesses cannot affect the question of reliability, and the evidence is of such a character that the appellate Court does not agree with the findings of the trial Judge; or, second, that the facts are of an almost overwhelming character against the finding of the Judge, so much so that his finding ought not to be allowed to stand. In this case the evidence is not overwhelming. I might say that the evidence is fairly evenly balanced, and it is not a case where the appearance and demeanour of the witnesses might not have an effect on the question of their credibility. In fact, the learned trial Judge has referred to the appearance of the plaintiffs in the course of the trial, particularly in connection with what they allege respecting the signing of the release, without distinctly understanding what was in it. I am not, therefore, disposed to interfere with the finding of the learned trial Judge, even supposing that the inclination

of my mind might be opposed to what he has found; but the inclination of my mind is rather with the finding of the learned trial Judge. I refer, in the first place, to the contents of the release itself—to the way it is worded—I refer to the fact that the intention was anyway for the syndicate to give up their rights with respect to the $1.15 per acre for the purpose of protecting the shareholders; and what difference would it make whether that was to be effected by the Canadian Savings Company taking the matter in hand, or by the railway company granting an extension? Then there is the testimony of Sir Daniel McMillan, whose recollection, it is true, is not very clear upon all matters, but where it is clear it is directly opposed to that of the plaintiffs, and it would occur to me that, if some matters insisted upon by the plaintiffs had really taken place, he would have remembered it. On the whole I think the weight of testimony is in favour of the finding of the learned trial Judge.

It was urged, however, that this release was not delivered, that the delivery to C. D. Scott was no delivery. Delivery is entirely a question of intention. A person may keep a deed, and still it may be held that there has been a complete execution of it. When the plaintiffs executed this instrument, what as a matter of fact was their intention? I have no doubt about it. Their intention was that whatever power or right of action they had in respect to the contracts in question was given up in so far as they were individually concerned. That, to my mind, was their clear intention in executing this document and handing it to Mr. Scott to take away. In Xenos v. Wickham, L. R. 2 H. L. at p. 309, Pigott, B., quoting from Doe d. Garnons v. Knight, states the following: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential."

It was further contended that the release in question was conditional on its face, and only binding when executed by all the members of the syndicate. I cannot agree with the proposition that the release was conditional on its face, but I am of opinion, looking at the purpose for which it

was prepared and executed, that the intention was that all the members of the syndicate should execute it. It was contended that for that reason it was only delivered as an escrow. I cannot accede to that proposition. It was not delivered to C. D. Scott with the understanding that it should only take effect when all the members of the syndicate had executed it. There was no statement or agreement to that effect; but, as before stated, it was executed and handed to Scott by the plaintiffs with the intention that, in so far as they were able to bring it about, their rights under the agreement were released. It might be, and would be, I think, if all the members of the syndicate did not execute the release, that the execution of it by the plaintiffs would be inoperative. In Bowker v. Burdekin, 8 Rul. Cas. 599, the question arose whether a deed executed by one of several partners, which on its face purported to convey for the partner executing it and all the other partners all their personal property, operated to convey the share of that one, and the question was raised as to whether the deed was delivered as an escrow. Evidently the Court in that case considered the question of whether the deed was delivered as an escrow or not as a question of fact, and Lord Abinger in delivering judgment, at p. 608, states: "If he had executed the deed expressly upon a condition that his partner should execute it afterwards, and that had been proved to the satisfaction of the jury, and they had found that, the deed would then have been inoperative till the last partner had executed. But that is not so; the deed is executed by him, to take such effect as he could give to it at the moment, and it does pass all his property in the joint effects, at least to the assignee." And Parke, B., at p. 610, states: "In this case, the execution of the deed was proved in the ordinary form, and I take it now to be settled (though the law was otherwise in ancient times, as appears by Sheppard's Touchstone), that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, all that took place at the time, and to the result of the thing, and therefore, though it is in form delivered as a deed, yet if it really would be inferred that it was delivered not to take effect as a deed till a certain condition was performed, then it would have operated as an escrow. That is the result of the two cases cited in argument, Johnson v. Baker

and Murray v. The Earl of Stair. But there is no fact of that kind in this case; the execution took place in the ordinary way." In London Freehold, etc., Co. v. Suffield, [1897] 2 Ch. 608, the question arose whether a deed was an escrow or not, and Lindley, M.R., in delivering the judgment of the Court, states at p. 620: "It is, in our opinion, clear that the deed was sealed and delivered by the company, acting through its directors and secretary, as a deed, i.e., as a perfect instrument; and that it was so executed in order that it might be used as an operative deed for the purpose of carrying out the contemplated arrangement by which the several existing mortgages bearing interest at 5 per cent. might be replaced by one mortgage bearing interest at 4½ per cent." So, I hold in this case that this release was executed by these parties as an operative release for the purpose of carrying out the contemplated arrangement by which the extension of time was to be procured from the Canadian Pacific Railway Company for the benefit of the stockholders of the defendant company. And in the same case, at p. 622, the Master of the Rolls states: "Upon the evidence, however, to which we have already referred, we come to the conclusion that the mortgage was executed as a complete deed, and that it was given as such to Wynne in order to enable him to carry out the arrangements to which we have before alluded; and to carry them out as he thought proper."

It was contended that the plaintiffs had the right to revoke and did revoke the release. So far as the plaintiff Huggard is concerned, I cannot perceive that he had any right to revoke the release at the time that he made the request. The release was executed some time in February, 1905, and this request by Huggard was made by letter to C. D. Scott dated 14th April, 1905; at that time all the members of the syndicate had executed the release. The request by the plaintiff Corelli to strike his name off the agreement was by letter to C. D. Scott, dated 24th February, 1905, a few days after the release was executed. This letter was received by Scott about 28th February; but Scott, who was the secretary of the defendant company, had, at a meeting of the directors held on 25th February, and before the receipt of this letter from Corelli, informed the company that the release had been executed by several of those interested. The minute of that meeting, which was put in evidence, is to the effect that Scott had informed

the directors that several of those interested had agreed to give a release. Scott, however, testified that this was an error, that what he did report was that the several parties had actually executed a release. I do not think that the evidence is clear that any member of the syndicate had executed this release between the time that the plaintiffs executed it and the receipt of this letter from Corelli, except Sir Daniel McMillan, and I am not disposed to attach very much weight to the fact that the secretary had reported the execution of this release by the plaintiffs to the board of directors, because, assuming that they had a right to cancel or revoke their execution while in the hands of the secretary of the company, it would seem to me that they would have a right to revoke it after the report was made to the directors, provided that no other persons had in the meanwhile executed the release.

This brings me down to the question of the right of these parties to revoke; and I am strongly of the opinion that there was no right to revoke this release under the circumstances. I have held that it was not delivered as an escrow. A number of cases however were cited in support of their right to revoke, but all these cases with one exception were cases of deeds executed by a debtor for the benefit of his creditors, and the release has been held revocable before assent has been given to it, or, in other words, before it has been accepted by the creditors. The only case cited which is not one of the character that I have mentioned is Peto v. Peto, 16 Sim. 590. In that case a deed was made by a number of persons, which the Vice-Chancellor held was made upon the assumption that all the children of one Ann Grissell would ultimately concur in the intended arrangement. One of the persons who it was contemplated would execute it, did not do so, and a great many years elapsed. The Vice-Chancellor held that the deed was inoperative. No question of revocation came up there. It seems to me that this release is in an entirely different position from the case of a deed to a trustee for benefit of creditors. In the first place, a deed executed for the benefit of creditors is entirely without consideration until it is accepted; but a release may be without consideration (that is one of the peculiar features of it), and if delivered it will operate absolutely. In the next place, there were persons in the case of this release who were interested and who had actually signed it both before and

after the plaintiffs had signed it, and before Corelli requested to have his name withdrawn from it, for instance, the defendant Maude A. Scott at any rate had signed it, and I think some others in the east. After the plaintiff Corelli signed it, Sir Daniel McMillan signed it, and he signed it under circumstances which shewed that he was extremely desirous to be relieved of the matter altogether; he took pains to ascertain from his own counsel whether the release was absolute or not before he signed it, and he expressed his great desire to hear no more about the matter. Now, it seems to me under such circumstances that it did not lie in the power of the plaintiff Corelli to revoke his execution of this instrument, and thereby make it utterly invalid. I think what I have stated covers the question of the release, and the manner in which it affects the plaintiffs' right of action.

I am of opinion that the learned trial Judge's judgment was correct, and should be affirmed with costs.

It will not be necessary to express any opinion with respect to the other question raised, namely, that these plaintiffs were promoters of the defendant company, and, as such, were not in a position to make any profit from their dealings with such company, beyond this, that it seems to me that the question, to say the least, is one quite worthy of very serious consideration.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

REX v. BARRETT.

Criminal Law—Indictment for Murder—Judge's Charge—Withdrawal from Consideration of Jury of Question whether Evidence Shews merely Manslaughter—Crown Case Reserved—Criminal Code.

Crown case reserved. The facts are stated below.

The case was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, JJ.

James McKay, K.C., for the accused.

Frank Ford, K.C., for the Crown.

WETMORE, C.J.:—The accused Barrett was charged with the murder of one Burnell Johnstone, a lad of 10 years of age, on or about 14th October last, and was tried before my brother Johnstone, with a jury, in June of this year. He was convicted and sentenced to death. The learned trial Judge reserved a case for the consideration of this Court.

The evidence established that the deceased was shot in the arm with a revolver in the hands of the accused, and that as a result of such shooting the lad died a few days afterwards. This was not questioned on the part of the accused. The evidence on behalf of the Crown set forth that on the evening that this shooting was done the accused was downstairs in his house, and was called upstairs, at the instigation of his wife, by one of the children to go to bed. There was a light burning in the room when he came up, which he put out, and he sat down on a trunk in the room. His wife then asked him to light the lamp, which he did. She then asked him to come to bed. The accused then began to state that he was going to shoot all the cattle, and what he could not shoot he was going to burn. His wife said to him: "Do not do that, sell them and get enough money to send me home to Heber." This was the testimony of the elder girl, Clara May Johnstone. The testimony of the younger girl, Ethel Margaret Johnstone, was that she said: "Don't do that; if you are tired of me, sell everything and get me enough money to send me home." At any rate, the testimony of both was that he replied to the effect, "God damn you, I wouldn't give you enough to send you to the pig-pen." (Clara May, Ethel Margaret, and the deceased Burnell were stepchildren of the accused, being the children of his wife by another husband, one Johnstone. I may state here that this woman really was not the wife of Barrett, because he had previously been married to another woman, who was alive at the time that the woman he was living with married him). These children were all sleeping in the room upstairs, and at the stage of the transaction which I have just mentioned they got up and dressed themselves. About then the accused "slipped around the bed," as it is expressed, and, producing a revolver, pointed it over the bed and snapped it at his wife. The revolver did not go off; I do not know why—whether it was because the chamber was not loaded does not clearly appear. At this his wife jumped up and screamed, and he

said, "Now, God damn you, down on your knees." Upon this, Burnell, the deceased, ran up and said, "Oh, Pa, don't shoot my Ma," and the accused then turned and shot him. The evidence of these two girls is most positive that it was deliberately done, and that it was no accident; they state that he deliberately turned and fired at the lad. The elder girl was 9 years of age, and was sworn; the younger girl was 6, and was not sworn. Clara distinctly swore that it was no accident, she swore she saw him turn and shoot her brother, that there was no accident about it. The other girl stated that he turned to shoot Burnell. According to this testimony, the shooting was of a most deliberate character. Evidently there must, according to this testimony, have been some cause of dispute or quarrel between Barrett and his alleged wife, but just what the cause of it was is not very clear. There was some evidence given on his part as to a communication that Burnell had made to him respecting his wife going to one Thompson's, but this communication was made after the shooting had taken place. There is also some testimony which would point in the direction that he was suspicious as to the chastity of his alleged wife. But this last seems to be of a very vague character. The accused was sworn and gave testimony, and the defence he set up was that the shooting was an entire accident, that they were all talking amicably in the room without any excitement or trouble of any character, that some dogs were making a noise outside of the window, and the deceased asked permission to shoot them, and his intention was to shoot them out of the window, that he got the revolver for the purpose, and that the dogs went away before he got an opportunity to shoot, and that he then returned the revolver to the accused, that it was cocked, and that in some way it went off and wounded the boy.

The learned trial Judge charged in effect that there was, under the evidence, only one of two verdicts the jury could give; one, if they believed the evidence for the Crown, of murder; the other, if they believed the evidence of the accused, of acquittal. After the jury had retired, counsel for the prisoner requested the learned trial Judge to recall the jury and state to them that it was open to them under the charge to bring in a verdict of manslaughter if they were of opinion that the evidence warranted such a verdict, and he urged that there was evidence from which the

jury might find that the accused did the shooting under provocation, or that his mind was in such a state from excitement or provocation that he was not fully responsible for what he was doing, and therefore that the jury might find the crime reduced to manslaughter. The learned trial Judge declined to so charge the jury. No objection was taken to any other part of the charge, nor was any other objection taken to the charge or to the trial at the argument of this stated case than that which I have just mentioned. As a matter of fact, the learned Judge did draw a distinction in a general way between what constituted murder and what constituted manslaughter, but there is no doubt that he did in effect withdraw from the jury the question of their right to bring in a verdict of manslaughter. That is the whole question that is raised before this Court. The character of the alleged murder here must be considered in determining this question. The question of the purpose of the act by which the murder was brought about does not arise, as it would in some cases; for instance, we will suppose that one fires a revolver at another and kills him; the question would be submitted to the jury, what was the intention of the accused when firing the shot? And, before the party could be convicted of murder, the jury would have to find that it was done with intent to kill, or that it was done with the intent to do grievous bodily harm or to wound, and that it was done recklessly, knowing that it was likely to cause death, and indifferent whether it caused death or not. And all this would be a question of fact. In this case it seems to me the principal question would be, inasmuch as the deceased was shot where he was shot (in the arm)—did he do this shooting and wounding of this lad recklessly, knowing that it might cause death, or very serious injury liable to result in death, and indifferent whether it did or not? I repeat, there is no question raised that the Judge's charge was erroneous in this respect, in that he did not put that question properly before the jury. The little girls testify that the shooting was most deliberately done, as I have before stated. The accused chose to take the stand. He simply raised the question that the shooting was done accidentally; he raised no question of provocation; he raised no question of being excited. Under such circumstances, I utterly fail to perceive what the jury had to decide except what the learned trial Judge referred to them. The police

sergeant who arrested Barrett stated in his testimony that when he arrested the accused he said to him: "Did you shoot the boy?" to which the accused answered: "I know I did, I was so aggravated—I won't say crazy—at the time." When the accused was on the stand he utterly denied stating anything of the sort to the sergeant. The accused, by going upon the stand and testifying as he did, to my mind, narrowed down the issue to the two questions submitted by the learned trial Judge. The learned counsel for the accused very strongly relied upon the judgment of Hunter, C.J., in Rex v. Scherf, 8 W. L. R. 219. Undoubtedly, if that judgment lays down the law correctly, the contention on behalf of the accused in this case should prevail, and there should be a new trial. The conclusion of that judgment seems to me to be that on a trial for murder any and every phase that might strike the minds of a jury, whether there is evidence to support it or not, should be brought under the notice of the jury, and they should be asked to pass upon it. With great deference to the opinion of that learned Judge, I am unable to follow his judgment in that respect. I am free to confess that I can in the trial of criminal cases discover no difference, in what should be left to the jury, between them and the trial of a civil case. In a civil case only the issues that are presented by the evidence will be submitted to the jury; it will not be allowed to travel off upon any fanciful matter which a jurymen may suggest and which the evidence does not warrant. In Gilbert v. The King, 38 S. C. R. 285, Harvey, J., in delivering the judgment of the majority of the Judges of the Supreme Court of the North-West Territories, states, at p. 291, as follows: "It is quite easy to see that an hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eyewitness of the shooting, determined to concoct a story which would enable him to escape the consequence of even that act; but this would be simply an hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis." Although I differed from the majority of the Court in that case upon another point, in so far as the matter which Harvey, J., was discussing when the remarks which I have quoted were made, I entirely agreed with him, and I am free to confess that I have not changed my opinion since. That judgment was upheld by the Supreme Court of Canada, and I am unable to distinguish

this case from it. Let me ask—what was the use of leaving the question of manslaughter to the jury in this case? The jury could not have found that there was any provocation here if they had any regard for their oaths, which were to deliver a true verdict according to the evidence, because the evidence did not support provocation, and the evidence did not support a charge of manslaughter. Under the evidence it was clearly murder or nothing. There was the statement made by the accused to Sergeant Marshall which I have quoted, but that did not prove that the act was done under provocation or excitement—it was merely a statement coming from the accused. It is true, it might be considered by a jury in a criminal case, while it was not, strictly speaking, evidence, being a statement made by the accused, not against his interests, but in favour of them—still, if the Crown counsel did not object to such testimony going in in a case of this sort, I have no doubt but that the jury would be entitled to give it consideration. But the accused goes upon the stand himself and he swears that that is not true; he swears in the first place that he never made such a statement to Marshall, and, in the next place, he swears there was no aggravation at all; he was cool, calm, no quarrel, no excitement, that this revolver simply went off by accident and he shot the boy. Then the learned counsel dwelt upon the fact that there was evidence shewing that he was kind to these children. That cannot affect the question under the testimony given here. I do not suppose that any one would say in this case that he deliberately intended to kill the boy; but he did deliberately fire at him with an instrument which he knew would be likely to cause serious consequences, and he did it recklessly, and the boy died. That constituted murder. And that was all the question the jury had to consider under the evidence. That and the question whether it was an accident. Section 261 of the Criminal Code, clause 1, provides: "Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation." There, by statutory enactment, are the circumstances stated whereby murder may under the evidence be reduced to manslaughter. In this case, then, where was the evidence to bring that provision of the law into operation, that is, to reduce the homicide from murder to manslaughter? Where was the provocation, to start

with, caused by this lad he shot? He did a very natural thing. His step-father snapped his revolver at his mother's head, she screamed, and the boy came forward and beseeched his step-father not to shoot his mother. There was no provocation in that. To emphasize this, I refer to paragraph 3 of that very section, which contains the following: "Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do." This seems to me to put the matter beyond all question. The boy had not only a legal right to do what he was doing, but he did what naturally the presumed affection for his parent would cause him to do. The learned Chief Justice of British Columbia has relied in his judgment upon the judgments of Gray and Shiras, JJ., in Sparf v. United States, 156 U. S. R. 51. I have to state that I agree with the judgment of the majority of the Judges in that case. Harlan, J., who delivered the judgment of the majority of the Court, is reported at p. 103 as follows: "To instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offences that might, under some circumstances, be included in the one so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offence charged—is not error; for the instructing or refusing to instruct, under the circumstances named, rests upon legal principles or presumptions which it is the province of the Court to declare for the guidance of the jury. In the case supposed the Court is as clearly in the exercise of its legitimate functions, as it is when ruling that particular evidence offered is not competent, or that evidence once admitted shall be stricken out and not be considered by the jury, or when it withdraws from the jury all proof of confessions by the accused, upon the ground that such confessions, not having been made freely and voluntarily, are inadmissible under the law as evidence against the accused."

I also call attention to clause 2 of sec. 951 of the Criminal Code, which is as follows: "On a count charging murder, if the evidence proves manslaughter, but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter." How can it be said

that the evidence in this case does not prove murder, but proves manslaughter?

I am of opinion that the conviction should be affirmed.

NEWLANDS and LAMONT, JJ., concurred.

PRENDERGAST, J.:—In the course of a trial for murder, my learned brother Johnstone in his charge directed the jury to bring in either a verdict of murder or acquittal; but did not instruct them that they could find the accused guilty of manslaughter—and the verdict was "guilty of murder."

The matter is now brought here as a Crown case reserved by the learned Judge for the opinion of this Court.

The case seems to me to raise the two questions: whether a trial Judge has, under any circumstances, power to withhold from a jury's consideration any of the offences expressly or impliedly contained in the charge; and whether, assuming such powers to exist, there were proper grounds to exercise it in this case.

I conceive there are two ways in which a particular offence can be withheld from a jury: either expressly, as when the Judge tells them that they cannot or must not find a particular offence proven; or impliedly, as when he charges them to find any one of two or more offences, but gives no direction as to another particular one.

I cannot agree, as was urged for the defendant, that there is any difference between the two. In each case the result is that the jury are made to understand that he particular offence is not before them and cannot be considered.

But, however strong a Judge's language may be with respect to any part of the whole of the evidence, if he makes it perfectly clear to the jury that while he entertains such views they are left altogether free to adopt such conclusions as seem to them proper, that of course will not be withholding a question from the jury.

In the present case, after referring generally in his charge to the difference between murder and manslaughter, the learned Judge said: "It appears to me that the verdict must be one of two things. If you believe the statement of the accused that it was accidental, that he was not pointing the revolver at any one, and that it was discharged accidentally, he must be acquitted. If, on the other hand, you believe the statements of the witnesses for the Crown, then he must be found guilty of murder."

The above language, "It appears to me that the verdict must be one of two things," is not, of course, very emphatic in itself, but, when coupled with the fact that the Judge thereafter made no reference whatsoever to manslaughter, what might be considered at first as an expression of opinion becomes in effect a direction, and I am satisfied that the trial Judge intended to withdraw manslaughter from the jury's consideration, and that the jury so understood.

The trial Judge's power to withhold from the jury in civil cases some or all of the issues of fact has, I believe, always been recognized and is constantly exercised. The judgment of nonsuit under the old practice, and under the present one the dismissal of the action at the close of the plaintiff's case, are founded on this power of the trial Judge, and would not be possible without it. In his book on evidence (10th ed., p. 28), Taylor says: "The Judge must at the close of each case determine whether any evidence has been given on which the jury can properly find the question for the party on whom the onus of proof lies; and if no such evidence exists, he ought to withdraw the question from the consideration of the jury," etc.

This is obvious in civil cases. But are such powers and duties restricted in a criminal trial?

I do not know of any case in the English Courts which is direct authority one way or the other, and counsel on the argument have cited none.

There are, however, two Canadian cases from which it seems to me that the very strongest inference can be drawn in favour of the contention that the Judges have also in criminal matters the powers referred to.

They are: The King v. Brennan, 4 Can. Crim. Cas. 41, and Gilbert v. The King, 38 S. C. R. 284.

In the first case the Court of Criminal Appeal of Ontario ordered a new trial, not on the bare ground—as was stated on the argument of this case—that the direction of the Judge amounted really to a withdrawal from the jury of certain matters of defence (which in that case was provocation), but on the ground that the evidence given of the matters of defence so withdrawn was such that the jury might have properly considered it. If the Court had taken the view urged by the defence here, it would have simply held, I think, that the Judge's direction having amounted to a withdrawal, that by itself entitled the accused to a new trial. But, on the contrary, they deemed it necessary to go further and inquire into the evidence; and it was

only after ascertaining that there was some evidence of the matter of defence withheld that could be properly considered, that they quashed the conviction. What, in other words, the Court inquired into was whether the power was rightly exercised, but it does not seem to have occurred to them that there might be doubt at all that the power existed. In that case, however, what the trial Judge withheld from the jury was only a fact or some facts bearing on a branch of the defence.

In the other case (Gilbert v. The King) what my brother Newlands withheld was, as in the case now before this Court, the intermediate charge of manslaughter; and the judgment was that, in view of the character of the defence and the evidence in support of it, there could be no objection to the charge by the trial Judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder. The Court held there that the Judge's power to withdraw the intermediate charge of manslaughter was rightly exercised—which, it again seems to me, was inferentially an admission of the existence of the power.

It was contended for the accused that the fact that the trial Judge in the present case did not expressly charge the jury with reference to manslaughter distinguishes it from Gilbert v. The King. As I have already stated, I do not think this is so; whether withdrawn expressly, as in the latter case, or impliedly, as in the present case, the offence is none the less withdrawn, and the whole course adopted by counsel for the accused here is based on the assumption that the jury understood that that charge was withheld from them.

There are two cases in the Supreme Court of British Columbia upon which the defence particularly relies; they are Rex v. Wong On, 10 B. C. R. 555, 8 Can. Crim. Cas. 423, and Rex v. Scherf, 8 W. L. R. 219. I may say, however, that, in my opinion, these cases are not authority for the proposition advanced.

In the first case the objection was, not that the trial Judge had withheld any question of fact from the jury, but that he had not stated the question of law to them. The objection is stated in the report as being that "the charge in question here does not contain a word of instructions as to the law defining and governing the crime of murder." True, the Chief Justice, who read the judgment of the Court,

says: "The authorities which have been brought to our attention go to shew that it is the duty of the Judge—and in my opinion the cardinal duty—in his address to the jury to define the crime charged, and to explain the difference between it and any other offence of which it is open to the jury to convict the accused." But the exact meaning of the words "of which it is open to the jury to convict the accused" would require to be first well ascertained, before deciding that the judgment bears on the case now before the Court.

In Rex v. Scherf, where the Court consisted of three Judges only, the learned Chief Justice, in very strong and forcible language, indeed, says that he is "prepared to lay down the proposition without qualification that it is not competent to a Judge, if he allows the case to go to the jury on the graver offence, to withdraw from their consideration a verdict for any lesser offence which might be included in the indictment." Clement, J., however, states expressly in his judgment that he is not prepared to go to the same length as the learned Chief Justice, as Gilbert v. The King seems, in his view, to stand in the way, and he gives other reasons for allowing a new trial—amongst others, that the evidence points strongly to an offence under sec. 211 of the Code, which in the case was an intermediary offence. Irving, J., the third Judge, as far as the report shews, simply says he agrees that there should be a new trial. It is clear, then, that the Court did not commit itself to the principle so broadly laid down by the learned Judge.

With all the respect and consideration that the learned Chief Justice's arguments are entitled to, I must say that I cannot agree with them. I think they could be resolved into two: first, that something in the evidence with respect to the intermediary offence, although perceived by the jury, may escape the attention of the Judge when he is busy taking notes, etc.; and second, that evidence on which the major offence can be found, is always evidence on which the lesser offence may be also found.

On the first point the learned Chief Justice says: "The fallacy of the whole argument in support of the Court of Appeal confirming or condoning the withdrawal by the trial Judge from the jury of the consideration of the intermediate verdict lies, then, in the fact that in the nature of things the Court of Appeal can never have before it the evidence as it appeared at the trial." He also gives an instance of what he considers would be a public miscarriage of justice

brought on by such circumstances. But there is not a single word said by the learned Chief Justice that does not also apply strictly to civil trials. That something of the evidence may escape the Judge's attention, that a Court of Appeal has not the advantage of noting the demeanour of witnesses, etc.,—all this is common to all jury trials, and the necessary conclusion to which we would find ourselves driven by the argument would be that in civil, as in criminal cases, the Judge would be bound to allow all cases and every issue in each case to go to the jury.

On the second point, I understand the learned Judge's argument, which he says is founded on the nature of things, to amount practically to this: if, on certain evidence, the ingredients A, B, and C, constituting the major offence, may be found,—there is necessarily room in the same evidence for the jury to find only the ingredients A and B constituting the lesser offence, and to leave the ingredient C aside as not proven. This may be so in many cases, and possibly in most cases, from the fact that in the class of cases which he assumes one offence is included in the other; but it is decidedly going too far to say that it is so in all cases. It seems obvious to me that it is easy to conceive evidence of such a character and so connected, that while it would give room to find A, B, and C either all proven or all not proven, it would yet offer no ground whatsoever to reasonably hold A and B proven and C not proven. Such was the case of Gilbert v. The King. The jury in that case might have disbelieved all the Crown's witnesses, and on that ground have held A, B, and C all unproven. But having found A and B, which alone amounted to manslaughter, the evidence was of such a character, and logically connected in such a way, that they had to hold the same of C.—which, being added to A and B, completed the requirements for murder.

Another feature of the above view is that it supposes that after the Crown has established the graver offence, the process by which that offence may be reduced to the lesser one is necessarily one of elimination; while the fact is that in a great many cases, the graver offence which would otherwise be held proven is reduced to the lesser one, not by breaking down or negativing any facts brought out by the Crown, but by shewing something else in addition, as, for instance, provocation. These cases are obviously not such that it can be properly said of them that the offence

could be reduced on the principle that "where the jury could find the more, they could find the less."

There is, then, the other branch of the case, whether the power was rightly exercised by the trial Judge. The question in another form is: was there evidence on which the jury could have found manslaughter? Or is there some evidence, however faint, even if there be only a scintilla of it, upon which something could be held proven which would reduce to manslaughter the offence of murder? I decidedly believe not. Counsel for the defence referred to some facts from which, he says, the jury might have construed provocation. But neither to the jury at the trial nor to this Court on appeal did the learned counsel undertake to suggest on what theory or supposition either Judge or jury could have found provocation on the facts, and, having found it, connected it ever so remotely with the shooting —to say nothing of connecting it closely enough to reduce the major offence to the lesser one.

In my opinion, the directions given to the jury by the learned trial Judge in his charge were proper, and the question should be answered "Yes."

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

REX v. CANADIAN NORTHERN R. W. CO.

Railway—Order of Board of Railway Commissioners—Establishment and Maintenance of Fireguard—Conviction of Railway Company for Neglecting — Non-publication of Order in Canada Gazette—No Proof of Notice to Railway Company—Objection not Taken before Magistrate—Jurisdiction—Conviction Contrary to Natural Justice—Certiorari — Motion to Quash — Evidence — Requirements of Fireguard — Prairie Country — Absence of Proof of — Amendment—Legislative Authority of Parliament—Proof that Railway Operated by Steam—Judicial Notice—Duplicate Offence.

Motion by defendants to make absolute a rule nisi for a certiorari to remove into the Supreme Court of Saskat

chewan a conviction of the defendants for neglecting to establish and maintain a sufficient fireguard along their line of railway at or near Aylesbury, contrary to paragraphs 8 and 11 of order 3245 of the Board of Railway Commissioners of Canada.

The motion was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

Norman Mackenzie, K.C., for the defendants.

Frank Ford, K.C., for the Crown.

WETMORE, C.J.:—The certiorari should go on the 5th ground of objection taken to the conviction That objection is that the conviction is bad because the order of the Board of Railway Commissioners was not published in the Canada Gazette, as required by sec. 31 of the Railway Act, and there was no evidence of any notice of such order to the company. Section 31 provides that "any rule, regulation, order, or decision of the Board shall, when published by the Board, or by leave of the Board, for 3 weeks in the Canada Gazette, and while the same remains in force, have the like effect as if enacted in this Act, and all Courts shall take judicial notice thereof." It was broadly contended that until the order is so published in the Gazette it has no force or effect. This provision applies not only to a regulation or order of the Board made under sec. 30, but it applies to any rule, order, or decision of the Board, and with equal force, for one cannot be separated from the other in so far as the effect of the section is concerned. Now, if we look back in the Act, we find that the Board has several powers and jurisdictions conferred upon it. By sec. 26 it has power and jurisdiction, among other things, to inquire into, hear, and determine any application by or on behalf of any party interested, complaining as therein mentioned, or requesting the Board to make any order or give any direction sanction, or approval which by law it is authorized to make or give, or with respect to any matter, act, or thing which by the Act or the special Act is prohibited, sanctioned, or required to be done. It has, therefore, say, power to make an order with respect to the manner in which a specified road or crossing shall be constructed or approach the railway. The Board has power to make decisions upon a variety of matters. Take sub-sec. 5 of sec. 26, for instance: it has power to decide as to whether any company, munici-

pality, or person is or is not a party interested within the meaning of the section. Now, does sec. 31 contemplate that every order or decision under sec. 26 or 27 shall be published in the Gazette before it takes effect? I cannot bring my mind to the conclusion that that was what Parliament intended; and I am, therefore, of opinion that it was not necessary that the order in question should have been published in the Gazette in order to give it effect. But, inasmuch as it was not so published, neither the company nor the Court was in a position to take notice of the order as if enacted, as they would have been in a position to do if it had been so published. It was conceded by the counsel for the prosecution that this order was never published in the Gazette until after the trial of this matter. The fact that the order had been passed by the Board was duly proved, but I am of opinion that, the order not having been published as required by sec. 31 of the Act, the company would not be liable for a breach of it unless it was proved that before such breach was made they had received notice of the passing of the order, and there was no evidence of any such notice having been given. It seems to me to be contrary to natural justice that a Board of Commissioners, sitting in private, as these commissioners might and probably did do, could make an order of this character and render a company liable to penalties without any notice whatever that such an order had been promulgated. There are decisions to establish that shareholders of an incorporated company must take notice of the by-laws, rules, and regulations of the company properly made. That is, I presume, because they are members of the corporation. Citizens of a municipality must take notice of the by-laws: see Regina v. Osler, 37 U. C. R. 324. The citizens of a municipality are members of a corporation, and I may state also that the by-laws of a municipality, as we know, are promulgated at meetings of the municipal council, which are open to the public just as meetings of Parliament are; and, where power is given to a municipality to pass by-laws, some formality has generally to be gone through by the provisions of the Act of incorporation which tends to give publicity to the promulgation of the by-laws, for instance, in this province the by-laws have to be read 3 times before they become law, and a period is given to enable citizens to attack the by-laws, and I think it will be generally found that in all the powers that are conferred upon municipalities to pass by-laws there

is something which has a tendency to give notice of the by-law before it comes into force. There may, however, be exceptions. In Best on Evidence, 8th ed., p. 319, I find the following: "Very many public bodies have, by charter or statute, power to make by-laws, rules, regulations, or orders. For these to take effect the mere resolution of the body making them is not sufficient. There must be some publication to the outside world, and the mode of publication is frequently, but by no means universally, prescribed by the charter or statute from which the power to make the by-law, &c., is derived. If this mode of publication be followed, the by-law, &c., would seem to be binding, whether it is in fact known of or not. If this mode of publication be disregarded, the by-law, &c., would seem not to be binding, although it be in fact known of. If no mode of publication be prescribed, it is difficult to say what mode will make the by-law binding. Blackstone says, speaking of the promulgation of laws generally, 'Whatever way is made use of it is incumbent on the promulgators to do it in the most public and conspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people.'" I also refer in this connection to 2 Abbott on Municipal Corporations, p. 1329. This Board, it seems to me, is not in the same position as a municipal council. It is not, as it were, enacting by-laws; it is making orders, rules, regulations, and decisions, which are of an entirely different character—a character which, it seems to me, involves the necessity of giving notice of some sort or other, a notice either by publication as provided for in sec. 31 or some other notice which will inform the persons or corporations interested of the order or regulation. The general purview of the Act, in my opinion, points in this direction. Of course, when the order or regulation is published, as provided in sec. 31 of the Act, it will be sufficient for all purposes. Sections 40 and 41 prescribe how notices shall be given, and sub-sec. 3 of sec. 41 prescribes that a regulation, order, direction, decision, report, or other document may, unless otherwise provided, be served in like manner as notice may be given under that section. Then sec. 42 provides that "every company shall, as soon as possible after receiving or being served with any regulation, etc., . . . of the Board, notify the same to each of its officers and servants performing duties which are or may be affected

thereby." It seems to me that that section is of very little or no use if the company are bound to take notice of the promulgation of the order or regulation irrespective of any notice whatever. That section clearly recognizes the propriety of giving notice of the regulation, etc., so that the company's employees may be instructed. It is difficult, therefore, to reconcile that with the idea that the company are themselves liable to a penalty, although they may never have received any notice of the promulgation of the order or regulation.

I am met with a difficulty, however, in giving effect to this conclusion, and that is that there is nothing to shew this Court that the objection ever was taken before the magistrate that there was no evidence of want of notice to the company. I am by no means disposed to encourage the practice of parties appearing before a justice or justices in a matter of this character or any other character, especially where they appear by counsel, and standing by and allowing the proceeding to finish when they have objections to it, and then, when the proceedings are all closed and the justices are not in a position to cure the matter, spring an application by certiorari upon them. There may be objections, however, that go to the root of the whole matter, that no injustice would be done if the Court laid its hand upon the proceeding, although no objection was taken before the justice, because it might be of such a character that the proceedings could not have been cured if the objection had been taken, and there may be cases where an injustice would be done if the Court did not give effect to the objection, that is, assuming it is not a matter of want of jurisdiction. If it is a matter of want of jurisdiction, as a matter of course the Court must give effect to the objection if it is brought under its notice. This is a case, in my opinion, where the Court should give effect to the objection, although not taken before the justices, whether it is a question of jurisdiction or not. Here are parties made liable to a penalty for an offence against an order of which there is no evidence that they had any notice whatever, either under sec. 31 or in any other way. It seems to me it would be a manifest injustice, therefore, to allow a conviction under such circumstances to stand.

I am of opinion that the certiorari should go, and when the proceedings are returned the conviction should be quashed.

PRENDERGAST and JOHNSTONE, JJ., concurred.

NEWLANDS, J.:—The defendants obtained a rule nisi for a writ of certiorari to remove into this Court a certain record of conviction made by John Gibson, justice of the peace, on the 10th day of January, 1908, whereby the defendants were convicted "for that they, the said Canadian Northern Railway Company, on or about the 30th day of September, A.D. 1907, at or near Aylesbury, did unlawfully neglect to establish and maintain a sufficient fireguard along the line of railway operated by the Canadian Northern Railway Company at above mentioned time and place, contrary to paragraphs 8 and 11 of order 3245 of the Board of Railway Commissioners of Canada, and without being entitled to the privilege of exemptions, exceptions, provisoes, or conditions set forth in paragraph 11, or any paragraph, of the said order, such exemptions being expressed in negative," on the following grounds:—

1. That there was no evidence to support the conviction.

2. That there was no evidence to shew that on 30th September, 1907, the defendants were operating any railway at or near Aylesbury.

3. That there was no evidence to shew that they operated a railway there by the power of steam.

The defendants produced the evidence taken before the justice of the peace. That evidence shews that the defendants had a line of railway near Aylesbury, and that they used a locomotive on this line.

If there is any evidence on which the justice can convict, this Court has no right to consider whether it is sufficient or not: Rex v. Davis, 6 T. R. 177. In that case Lord Kenyon said: "Here was evidence tending to prove the offence. That being the case, we have no authority to inquire further, and see whether the conclusion drawn by the magistrate be, or be not, the inevitable conclusion from the evidence. It is sufficient in convictions, if there is such evidence before the magistrate as would be sufficient to be left to the jury. Here we cannot say there was no evidence of the fact for the consideration of the magistrate."

4. That there was no evidence to shew that the defendants "failed or neglected to establish and maintain, on or about the 30th day of September, A.D. 1907, at or near Aylesbury, a good and sufficient fireguard outside or beyond area comprised within 300 feet from the centre of

the railway and on each side of the line of railway and at a useful and proper distance from the railway." It was argued by Mr. Mackenzie, K.C., for the defendants, that fireguards could lawfully be maintained under the said order at any convenient distance outside of 300 feet from the centre of the railway; that the evidence adduced by the Crown was directed to shew that there was no fireguard within 300 feet of the centre of the railway; that this was an erroneous view of sec. 8 of the rules, and the conviction being based on such an erroneous view is invalid.

The order of the Railway Commission provides that "every railway company subject to the legislative authority of the Parliament of Canada operating a railway by the power of steam, in the province of Saskatchewan, shall establish and maintain along the line of railway where the same passes through prairie country in the said province, on each side of such line of railway and of not less than 300 feet in width from the centre of the railway, a good and sufficient fireguard, to be made by ploughing the land to the extent of not less than 16 feet in width on the fireguard farthest from the railway, and by burning or otherwise freeing from inflammable materials the spaces between such ploughing and such line of railway."

Under this order the fireguard was to be 300 feet in width extending from the centre of the right of way. From the centre of the right of way to the outside of the fireguard would be 300 feet, and no part of the fireguard was required to be more than 300 feet from the centre of the right of way. The outside 16 feet of this fireguard was to be ploughed, and the remainder to be burnt off or otherwise kept free from inflammable material. The view the justice took of this order was, therefore, the correct one.

5. That the order was not in force on the 30th September, 1907, nor on the date of the conviction, because the same was not published in the Canada Gazette, as required by sec. 31 of the Railway Act, and there was no evidence either of the publication or of notice of the said order to the company.

Section 30 of the Railway Act gives the Railway Commission power to make orders and regulations (f) "with respect to the use on any engine of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and generally in connection with the railway, respecting the construction, use, and

maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway;" and they may also by the regulation provide a penalty not exceeding $100, to which every company shall be liable which offends against such regulation: vol. 1, R. S. C., p. 505.

Section 31 provides that the order or regulation when published by the Board, or by leave of the Board, for 3 weeks in the Canada Gazette, shall have the like effect as if enacted in that Act, and all Courts shall take judicial notice thereof.

Does this section require the order or regulation to be published as provided, before the order or regulation can take effect? It does not say so. Section 30 gives the Board power to make this regulation, and it has, therefore, power to put it into effect unless the Act requires that something else must be done before it becomes effective. Section 31 does not make any such provision. All that section does is to provide a way by which this regulation shall have the effect of an Act of Parliament, and after its publication requires all Courts to take judicial notice of it. Until that is done the regulation would have to be properly proved before a justice could act upon it.

The order itself states, by sec. 12, that the fireguards provided for shall be completed on or before the first day of September in the year in which it was passed (1907). Did they have power to make that provision? They have power to provide for the construction of fireguards, and surely that gives the Board the power to say when they shall be constructed, and, as there is no provision in the Act requiring anything else to be done before such orders become operative, they must take effect from the date mentioned in the order. This order or regulation was not published as provided in sec. 31; therefore the justice could not take judicial notice of it. At the trial before the justice a copy of this order or regulation, certified as required by sec. 69, sub-sec. 2, of the Act, was put in evidence, and the conviction sets out the order.

I think the Canadian Northern Railway Company were bound to comply with the order according to its terms; that it was properly proved before the justice; and that therefore he had power to convict the company for a breach of its provisions.

6. That the said conviction was bad on the face of it, because it does not shew that the said railway at or near Aylesbury passes through prairie country.

It is only an offence under this order if the company do not establish fireguards where the railway runs through a prairie country. In order to give the justice jurisdiction it must be proved by evidence before him that the place where the fireguard was not established was prairie country, otherwise there would be no offence, and this fact must be set out in the conviction so that the conviction will shew jurisdiction in the justice to convict. Section 1124 of the Code provides that no conviction shall be held invalid for any irregularity, informality, or insufficiency therein, if the Court before which the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed over which the justice had jurisdiction.

The conviction is insufficient because the fact is not set out that it was in a prairie country. The evidence taken before the justice shews that there was evidence given that the country where the company omitted to establish fireguards was a prairie country, and I am satisfied from the evidence that an offence of the nature described was committed, and that the justice had jurisdiction.

In Regina v. Elliott, 12 O. R. 524, Rose, J., allowed a conviction to be amended under a similar provision of the Canada Temperance Act where the conviction did not set out that the Act was in force in the county where the offence occurred, there being evidence before the justice that the Act was in force. In giving judgment he said (p. 530): "I find, looking at the evidence, that the Act was brought into force. As I must decide upon the merits, I cannot yield to the objection that the Gazette which was produced and marked as an exhibit, is not among the papers returned, for I ought to allow such omission to be now remedied by requiring a more complete return, and therefore treat the evidence as if it had been returned. I should therefore amend the conviction under sec. 118, to remedy that defect as to the non-statement of jurisdiction, and as against such objection refuse to quash."

As this is an application for a writ of certiorari, and, if an order for this writ is made, the justice could return an amended conviction supplying this defect, there having

maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway;" and they may also by the regulation provide a penalty not exceeding $100, to which every company shall be liable which offends against such regulation: vol. 1, R. S. C., p. 505.

Section 31 provides that the order or regulation when published by the Board, or by leave of the Board, for 3 weeks in the Canada Gazette, shall have the like effect as if enacted in that Act, and all Courts shall take judicial notice thereof.

Does this section require the order or regulation to be published as provided, before the order or regulation can take effect? It does not say so. Section 30 gives the Board power to make this regulation, and it has, therefore, power to put it into effect unless the Act requires that something else must be done before it becomes effective. Section 31 does not make any such provision. All that section does is to provide a way by which this regulation shall have the effect of an Act of Parliament, and after its publication requires all Courts to take judicial notice of it. Until that is done the regulation would have to be properly proved before a justice could act upon it.

The order itself states, by sec. 12, that the fireguards provided for shall be completed on or before the first day of September in the year in which it was passed (1907). Did they have power to make that provision? They have power to provide for the construction of fireguards, and surely that gives the Board the power to say when they shall be constructed, and, as there is no provision in the Act requiring anything else to be done before such orders become operative, they must take effect from the date mentioned in the order. This order or regulation was not published as provided in sec. 31; therefore the justice could not take judicial notice of it. At the trial before the justice a copy of this order or regulation, certified as required by sec. 69, sub-sec. 2, of the Act, was put in evidence, and the conviction sets out the order.

I think the Canadian Northern Railway Company were bound to comply with the order according to its terms; that it was properly proved before the justice; and that therefore he had power to convict the company for a breach of its provisions.

6. That the said conviction was bad on the face of it, because it does not shew that the said railway at or near Aylesbury passes through prairie country.

It is only an offence under this order if the company do not establish fireguards where the railway runs through a prairie country. In order to give the justice jurisdiction it must be proved by evidence before him that the place where the fireguard was not established was prairie country, otherwise there would be no offence, and this fact must be set out in the conviction so that the conviction will shew jurisdiction in the justice to convict. Section 1124 of the Code provides that no conviction shall be held invalid for any irregularity, informality, or insufficiency therein, if the Court before which the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed over which the justice had jurisdiction.

The conviction is insufficient because the fact is not set out that it was in a prairie country. The evidence taken before the justice shews that there was evidence given that the country where the company omitted to establish fireguards was a prairie country, and I am satisfied from the evidence that an offence of the nature described was committed, and that the justice had jurisdiction.

In Regina v. Elliott, 12 O. R. 524, Rose, J., allowed a conviction to be amended under a similar provision of the Canada Temperance Act where the conviction did not set out that the Act was in force in the county where the offence occurred, there being evidence before the justice that the Act was in force. In giving judgment he said (p. 530): "I find, looking at the evidence, that the Act was brought into force. As I must decide upon the merits, I cannot yield to the objection that the Gazette which was produced and marked as an exhibit, is not among the papers returned, for I ought to allow such omission to be now remedied by requiring a more complete return, and therefore treat the evidence as if it had been returned. I should therefore amend the conviction under sec. 118, to remedy that defect as to the non-statement of jurisdiction, and as against such objection refuse to quash."

As this is an application for a writ of certiorari, and, if an order for this writ is made, the justice could return an amended conviction supplying this defect, there having

been evidence before him to warrant it, the conviction should not be quashed on this ground without the issue of the writ.

9. That the said conviction is bad on its face because it does not allege that the Canadian Northern Railway Company are a company subject to the legislative authority of the Parliament of Canada, and because it does not allege that the company operate their railway by the power of steam.

Now, what is the best evidence that a railway company are subject to the legislative authority of the Parliament of Canada? Surely the Act of that Parliament incorporating such railway company. The Canadian Northern Railway Company were incorporated by ch. 57 of the Acts of 62 & 63 Vict. Section 13 of the Interpretation Act provides that every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act, and sec. 18 of the Evidence Act provides that judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded.

The justice, therefore, took judicial notice of the fact that the defendant company had been incorporated by an Act of the Canadian Parliament, and that is, I think, the best evidence he could have that that railway was subject to the legislative authority of the Parliament of Canada.

As to its being operated by the power of steam, I have already said there was some evidence of that fact before him. On the return of a writ of certiorari he could return an amended conviction setting out both of these facts, there having been evidence before him on which to make the finding.

10. That the said conviction is bad on the face as it is for two distinct offences, namely: (a) for unlawfully neglecting to establish fireguards; (b) unlawfully neglecting to maintain fireguards.

The words of the order are "shall establish and maintain . . . good and sufficient fireguard." What is a fireguard? The order says it is to be made "by ploughing the land to the extent of not less than 16 feet in width on the side of the fireguard farthest from the railway, and by burning or otherwise freeing from inflammable material the space between such ploughing and such line of railway." It is common knowledge that ploughed and burnt land will grow up again with weeds, and, if these are allowed to die

and dry in the soil, they become inflammable. The only way to keep the fireguard effective is to again plough the ploughed land as soon as it grows up with weeds and burn off the weeds that have grown up on the burnt land. Therefore establishing and maintaining are practically the same thing—a continuous act to keep the space called the fireguard free from inflammable material. The offence is that a space of 300 feet from the centre of the railway has not been ploughed and burnt in such a way as to be free from inflammable material. That is and can be only one offence. It is stated in the conviction in the words of the order, and that is sufficient.

Several other objections were taken in the rule nisi, but they were abandoned on the argument. The Court was asked by the counsel for the parties to quash the conviction without the issue of the writ if the conviction was bad and could not be amended on the return of the writ. In my opinion the conviction can be amended and should not be quashed, but the rule go for the issue of the writ.

LAMONT, J., concurred.

SASKATCHEWAN.

JULY 10TH, 1908.

FULL COURT.

REX v. CANADIAN PACIFIC R. W. CO.

Railway—Order of Board of Railway Commissioners—Establishment and Maintenance of Fireguard — Conviction of Railway Company for Neglecting—Justice of the Peace—Jurisdiction—Evidence—Proof of Order of Board—Seal—Prairie Country — Absence of Proof of — Certiorari—Quashing Convictions.

Motion by defendants to make absolute rules nisi to quash 3 convictions of the defendants for neglect to establish and maintain sufficient fireguards along the line of their railway at Secretan, Ernfold, and Kennedy, upon grounds similar to those in the previous case.

The motion was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

C. P. Fullerton, Winnipeg, for the defendants.

Frank Ford, K.C., for the Crown.

WETMORE, C.J.:—The writs of certiorari must issue in these cases, and, when returned, the convictions must be quashed on the same grounds as set forth in Rex v. Canadian Northern Railway Company.

PRENDERGAST and JOHNSTONE, JJ., concurred.

NEWLANDS, J.:—The Secretan case is similar to that of Rex v. Canadian Northern Railway Company, and the grounds taken in the rule nisi are the same, with the addition of two other grounds, which were:—

1. That there was no evidence to shew that the alleged offence was committed within the jurisdiction of the justice of the peace.

Both the information and conviction recite that the offence was committed near Secretan, in the province of Saskatchewan, and that the justice was a justice of the peace in and for said province. Neither of these facts was denied, and therefore it is sufficiently shewn that the offence was committed within the jurisdiction of the justice.

2. That the order of the Board of Railway Commissioners for Canada referred to in the information and complaint was not proven.

There is attached to the affidavit of the defendants' solicitor the evidence taken before the justice. This evidence shews that the order was put in, and a copy of it was annexed to that affidavit. Mr. Fullerton, for the defendants, contends that that order was not under seal. That is a question that I cannot decide without the return of the papers put in before the justice. If it was not under seal, there would be no evidence under sec. 69, sub-sec. 2, of the Railway Act of the fact that there was such an order, and the justice could not convict. Otherwise this case is similar to Rex v. Canadian Northern Railway Company.

The Ernfold and Kennedy cases are similar to the Secretan case, and Rex v. Canadian Northern Railway Company.

In neither of these cases is there any evidence that the country in which defendants did not establish a fireguard along their line of railway is a prairie country. In the Ernfold case the only evidence of the nature of the country is that it was hilly, and in the Kennedy cases there is no evidence at all of the nature of the country. As it is only in a prairie country that the company are required to establish fireguards, no offence was proved, and the justice had no jurisdiction.

The convictions in these cases should be quashed without the issue of a writ of certiorari.

LAMONT, J., concurred.

SASKATCHEWAN.

NEWLANDS, J. JULY 10TH, 1908.

TRIAL.

MILESTONE v. CITY OF MOOSE JAW.

Municipal Corporation—Contract to Transfer Lands of Corporation—Contract under Seal of Corporation and Signatures of Mayor and Secretary-Treasurer—Proof of Authority—Proceedings of Council not entered on Minutes—Proof of by Oral Testimony—Absence of Resolution—Necessity for By-law—Property Acquired by Gift—Enforcing Contract—Mistake—Specific Performance—Damages.

Action for specific performance of a contract, as set out in the judgment.

F. W. G. Haultain, K.C., for plaintiff.

J. F. Frame, Regina, for defendants.

NEWLANDS, J.:—This is an action for the specific performance of an agreement under seal entered into between the plaintiff and defendants on 29th December, 1906, whereby the defendants agreed to transfer to the plaintiff 10 lots to be selected by him in blocks 98, 128, and 106, saving and excepting out of block 106 lots 21 and 22, and

plaintiff agreed to pay to defendants the sum of $750 and discontinue an action then pending between himself and the defendants and withdraw all caveats and injunctions registered by him against said blocks. After the execution of this agreement the plaintiff paid to defendants $750, discontinued said action, and withdrew his caveats and injunctions as agreed.

The defence is non est factum and that the agreement was entered into under a mistake of fact.

The facts are that there was an action pending between the plaintiff and defendants in respect to said blocks, that defendants were anxious to settle this action, that several conversations took place between individual members of the council of the defendants and plaintiff in reference to this settlement, and that finally a meeting of the defendants' council was held on 28th December, 1906, at which a committee was appointed to interview plaintiff and make an offer of settlement; that this committee met plaintiff, made him an offer which he did not then accept, but told them to draw up an agreement and he would then see whether he would accept the same. The committee then returned to the council and reported to it; the city solicitor was instructed to draw up an agreement; the next day the mayor instructed the partner of the city solicitor to draw up the agreement, and he drew up the agreement sued on; the mayor read it over and signed it, took it to plaintiff, who then read it over and signed it; they then went to the secretary-treasurer of the city, who signed it without reading it over and affixed to it the corporate seal of the city of Moose Jaw; plaintiff got one copy of it and the secretary-treasurer retained the other; the secretary-treasurer then drew up a cheque for $750, which plaintiff signed; he then drew up a receipt for the same and handed it to plaintiff, and two days later he deposited this cheque to the credit of the city, and the same was duly paid. This cheque and receipt were in the following words and were all in the handwriting of the secretary-treasurer excepting the signature of plaintiff on cheque:

"No. 35. Moose Jaw, Assa., 29th Dec., 1906.
"To The Canadian Bank of Commerce, Moose Jaw Branch.
"Pay John D. Simpson, Secy.-Treas., or order, seven hundred and fifty dollars.

"Pay of 10 lots in block 98—128 and 96 except lots 21 and 22 in Bk. 106.

"$750.00. C. W. Milestone."

"City of Moose Jaw,

"No. 1240. Moose Jaw, 29th Dec., 1906

"Received from C. W. Milestone the sum of seven hundred and fifty dollars for pay of 10 lots in block 98, 128 and 106 except lots 21 and 22 in block 106 in full of settlement of C. W. Milestone v. City of Moose Jaw.

"$750.00. John D. Simpson,
Secretary-Treasurer."

On 3rd January, 1907, the plaintiff wrote the following letter to defendants:—

"Moose Jaw, N.W.T., Jan. 3rd, 1907

"The Mayor and Council,
City of Moose Jaw,
Moose Jaw, Sask.

"Gentlemen,—In pursuance with our agreement dated December 29th, 1906, I hereby select my ten lots as follows, namely: lots numbers one (1) and (2) two, in block numbers one hundred and twenty-eight (128), and lots numbers two (2), eleven (11), fifteen (15), eighteen (18), twenty-three (23), thirty-three (33), and thirty-nine (39) in block number ninety-eight (98).

"Kindly arrange to give me the deed of these lots soon as possible.

"Yours truly,
C. W. Milestone."

On 13th February the secretary-treasurer sent plaintiff a cheque for $750 (this letter was apparently not put in at the trial), and plaintiff returned same on the 15th February. Some further communications took place between the parties, after which this action was brought.

It is contended on the part of the defendants that the agreement of 29th December, 1906, does not truly set out what was agreed upon between the parties, but that they only offered plaintiff the selection of 10 lots in block 128, and that it was drawn up giving him a selection of 3 blocks by mistake.

Now, it was established at the trial that a special meeting of the council of the city of Moose Jaw, properly constituted, was held on 28th December, 1906, that a settlement with plaintiff was discussed, that a committee of the council met him, and afterwards reported to the council. It was also proved that no minutes of the discussion or action of the council in reference to this transaction were kept, and that this was done at the suggestion of the city solicitor.

It was not contended by counsel that the corporate seal of the municipality could be affixed to the agreement without at least a resolution of the council, nor do I think that could be successfully contended. The council must by resolution either authorize the execution of the agreement or afterwards confirm it. This agreement was signed by the mayor and secretary-treasurer, and the latter placed upon it the corporate seal of the city of Moose Jaw, and under the authority of D'Arcy v. Tamar Kit Hill and Callington R. W. Co., L. R. 2 Ex. 158, it is prima facie evidence that the mayor and secretary-treasurer had the necessary authority to sign and affix the corporate seal to this agreement. In that case Bramwell, B., said: "It is not to be presumed that what has been done is ultra vires, and therefore when an instrument is produced under the seal of the company, it is prima facie to be taken that the seal was properly affixed." And Channell, B., said: "On production of the bond under the corporate seal, it is prima facie to be assumed that it is valid; the defendants must shew that the necessary authority was not given; and I have no doubt that it is open to them to shew this under the plea non est factum."

The defendants have, therefore, to prove that the mayor and secretary-treasurer had no authority to sign this agreement and to affix the corporate seal. At the trial they proved that there was no entry on the minutes of the council shewing that they were given authority to do this. The question is therefore raised, is there any other way of proving the proceedings of the council than by the production of the minutes? The Municipal Ordinance provides that "the secretary-treasurer shall attend all meetings of the council, truly record all resolutions, decisions, and other proceedings of the council, and, if required by the council, shall record the name of every member voting and whether aye or nay on any question coming before the council: he shall keep the books, records, and accounts of the council, and shall preserve and file all accounts acted upon by the

council, and shall keep the original or certified copies of all by-laws of the council."

This section does not say that resolutions and proceedings of the council can only be proved by the production of the minutes, and it has been held in England, under statutes affecting companies containing similar provisions, that where a resolution has been passed but not entered in the minutes it may be proved by oral testimony. See Lindley's Law of Companies, p. 433, and Palmer's Company Law, p. 207, and the cases there cited; also the leading authority in the United States on the subject, Bank v. Dandridge, 12 Wheaton 64, where Mr. Justice Story, in delivering the judgment of the Supreme Court of the United States, goes very exhaustively into the subject. I think, therefore, there can be no doubt but that the proceedings of a council may be proved by oral testimony, when those proceedings are omitted to be entered on the minutes.

Is it then open to the defendants in this case to prove by oral testimony that no resolution was passed authorizing the mayor and secretary-treasurer to sign this agreement and affix the corporate seal? There is no question but that some action was taken by the council at their meeting of 28th December. Under sec. 110 of the Municipal Ordinance, above cited, a record of this transaction should have been entered in their minutes by the secretary-treasurer, but, as I have said, no mention of this transaction was made, on the advice of the city solicitor. Under these circumstances, I have come to the conclusion that they should not be allowed to give oral evidence on their own behalf of what took place, where they had deliberately refused to keep the record of their proceedings that they are directed by law to keep, and particularly where such oral evidence is given for the purpose of contradicting their solemn contract entered into with another person under their corporate seal, especially when that person, on the faith of that contract, had fully performed his part of it. As was said by Lord Chancellor Westbury in Grady's case, 1 De G. J. & S. 488, at p. 492: "But if a company has power to do a thing, and if there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of that power, then, if I find the company dealing with an individual at arms' length, and taking a transfer of shares, duly completing that

transfer, entering the transfer, and entering the transaction in books, so that I am warranted and justified in imputing a knowledge of it to every shareholder, I am fully borne out, not only by the reason of the thing, but by the express authority of the case to which I have referred, in inferring as against the company that the formality which alone is wanting to the exercise of the power had been either antecedently supplied or has been subsequently added to the transaction."

It was suggested at the trial that the plaintiff knew that a mistake had been made, and that the defendants had sold all the lots owned by them in block 98. Now, although Mr. McLean, the mayor, stated in his examination for discovery that plaintiff at the meeting the committee had with him on the night of 28th December agreed to take the 10 lots, he says he does not remember that the block was mentioned, and both the other members of the committee say that plaintiff did not accept the offer that night, but told them they should have the city solicitor prepare an agreement, and he would see whether he would accept it or not. Then as to plaintiff knowing that the lots in block 98 had been sold, he also knew that they had been sold subject to his claim, and that this fact was mentioned in the agreements of sale. Therefore, I cannot see that plaintiff can be charged with a knowledge of the mistake.

Mr. Frame also took the objection that the city could not act in a matter of this kind by resolution, but must pass a by-law, and he cited sub-sec. 76 of sec. 95 of the Municipal Ordinance passed in the first session of 1903, which is as follows: "Disposing of or devoting to some other municipal purpose, in whole or in part, any property acquired by the municipality for a specific purpose, when such property is, in the opinion of the council, no longer required or not required for the time being for the purpose for which it was originally acquired or to which it has been subsequently devoted." This, I think, applies only to property held by the city for a specific purpose, and not to property acquired by gift, as this land was, and which would be dealt with as revenue and not as property held for a specific purpose.

The next defence to be considered is that the agreement was made under a mistake in fact. I have no doubt that a mistake was made on the part of the defendants, but the plaintiff is not a party to that mistake, and is in no

way responsible for its having been made. The question, therefore, is, whether this is a case for specific performance or damages. In a late case on this subject, Van Praagh v. Everidge, [1902] 2 Ch. 266, Kekewich, J., discusses the cases previously decided, and deduces from them the principle that, where nothing has been done by the plaintiff to induce the blunder, there must be hardship amounting to injustice in keeping the defendant to his contract before specific performance will be refused. Now, would there be hardship amounting to injustice in keeping the defendants to their contract? I think there would, as to the lots selected by plaintiff in block 98. These lots have been sold by the defendants to other persons, some of whom have built upon them. In one case a building worth $2,000 has been put up, and it would certainly be most unjust to require defendants to transfer those lots to plaintiff, not only as to defendants but to the purchasers who now hold them under agreement of sale. I therefore will order specific performance of the contract as to lots 1 and 2 in block 128, but refuse it as to the other lots, but will allow plaintiff damages as to them.

I do not think I have sufficient evidence before me to assess these damages, so I will refer the case to the local registrar at Moose Jaw to assess the damages by ascertaining the value of the lots selected in block 98 without the buildings, and, after deducting therefrom the price of $75 each which plaintiff was to pay for them, allow plaintiff the difference as damages. Plaintiff will also have his costs of action.

SASKATCHEWAN.

JOHNSTONE, J. JULY 15TH, 1908.

TRIAL.

WESTAWAY v. STEWART.

Promissory Note—Default in Payment at 3 o'clock on Last Day of Grace—Seizure under Chattel Mortgage Later on Same Day—Bills of Exchange Act, sec. 121 (b)—Premature Seizure—Damages—Eviction.

Action for damages sustained by plaintiff through wrongful distress by defendants of plaintiff's goods, for conversion of such goods, and for the eviction of the plaintiff

from her premises, in which she carried on the business of a general merchant in the town of North Battleford.

A. M. Panton, Battleford, for plaintiff.

D. Keith, Battleford, for defendants.

JOHNSTONE, J.:—Prior to the date hereinafter mentioned the defendant Stewart had been carrying on the business of a general merchant in premises owned by him in North Battleford. On 16th February, 1907, a sale was effected by him of all his stock-in-trade then on his premises to the plaintiff, she giving in payment therefor the sum of $500 in cash, and her 4 several promissory notes for, in all, the sum of $4,600. These notes were secured by a chattel mortgage given on the stock as collateral security. The promissory notes falling due in March and May, 1907, were paid at maturity. On 21st August, 1907, one of the notes, a note for $1,000, fell due, and default was made in the payment of this note up to about 5 o'clock in the afternoon of such date, the last day of grace, when the defendants entered under the chattel mortgage and took possession of the store and seized all the goods and stock-in-trade therein. The defendants remained in possession 3 days, when the goods seized were removed to the premises of the defendant Jarman, where the same were sold at public auction, realizing sufficient to pay not only the promissory note for $1,000 in default, with interest and costs, but also the note which would fall due on 21st November for $1,100, the defendants claiming, by reason of default of payment of the note of 21st August, to be entitled to realize under the acceleration clause contained in the chattel mortgage, both notes with interest, amounting to $2,120.

There is no material dispute as to the facts, and the case resolves itself into a question purely and simply of law, namely, whether the seizure which took place on 21st August at 5 o'clock was premature; or, in other words, whether the plaintiff, the maker of the promissory note, had not the whole of the day of 21st August, the last day of grace, within which to pay the note. In Ontario, as early as 1859, the Court of Queen's Bench held, in Sinclair v. Robson, 16 U. C. R. 211, an action properly commenced at 5 o'clock of the last day of grace on a promissory note payable at a particualr bank, which note had been dishonoured for non-payment at 3 o'clock in the afternoon of such day.

In England such an action was held by the Queen's Bench Division in appeal to have been brought too soon. I refer to the case of Kennedy v. Thomas, [1894] 2 Q. B. 759.

I have arrived at the conclusion that the law as laid down by the latter case is that which should govern in the case before me. I adopt the reasoning of the learned Judges in the case of Kennedy v. Thomas. The conditions in Canada and England being the same, I would, of course, because of the dictum laid down in Trimble v. Hill, 5 App. Cas. 342, feel bound by the judgment of the Court of Appeal in England. But sub-sec. (b) of sec. 121 of our Bills of Exchange Act is not contained in the English Act, and the effect of this sub-section has to be considered. According to the law of England a bill or note may be presented for payment at any time within reasonable hours of the last day of grace, and, should payment be refused, the bill or note may be protested for non-payment. Yet the acceptor, or maker, as the case may be, has the whole of such day of grace within which to pay. This is the law as laid down in Kennedy v. Thomas. In the face of sec. 42 of our Bills of Exchange Act, I cannot see that sub-sec. (b) has any greater effect than to extend the time for presenting a bill or note till 3 o'clock of the last day of grace. I am of opinion that this sub-section does not effect any other change. Under sec. 42 of our Bills of Exchange Act a bill (or note) is payable on the last day of grace. This is the same as sec. 14 of the English Bills of Exchange Act. Lord Justice Lopes in Kennedy v. Thomas, at p. 763, after referring to the provision in the English Act, says: "I read that as meaning that the bill is due and payable at the end of the last day of grace, and that no cause of action by the holder against the acceptor exists until the end of the third day of grace. If he has not the whole of the third day during which to meet the bill, I cannot see how he gets three days of grace." The decision in Sinclair v. Robson, if given effect to, would cause this section to read that the bill is due and payable at or before 3 o'clock. The Act 14 & 15 Vict. ch. 94, the Act mentioned in Sinclair v. Robson, did not contain a provision similar to that of our section 42. If it had, the result in Sinclair v. Robson might have been different. This provision was first introduced in 1872.

The plaintiff, under her mortgage to Stewart, had a right to peaceable possession of the goods and chattels seized

until default in payment, and, the defendants having seized and sold before default, she will be entitled to recover as damages the value of the goods seized, less the interest of the mortgagee therein. McAulay v. Allan, 20 C. P. 417, is still law. It was there held that the property in the goods having passed to the mortgagee, all the mortgagor would be entitled to recover in case of trespass to the goods by the mortgagee was the value of the goods less the mortgagee's interest therein by reason of his security. In this case all the authorities bearing on the subject were reviewed, and the decision in Albert v. Grosvenor Investment Co., L. R. 2 Q. B. 123, questioned. This decision has now been overruled by Williams v. Stern, 5 Q. B. D. 408.

The evidence given at the trial as to the value of the goods seized was too vague and uncertain to justify me in fixing their value at the time of seizure. There will, therefore, be a reference to the local registrar at Battleford to ascertain this value, and to inquire as to the full amount due the defendants the Canadian Bank of Commerce, on account of the several promissory notes and securities held by them.

Judgment will be entered for the plaintiff for the difference between the amount found to be due to the defendants and the value of the goods, together with the sum of $200 damages for the eviction by the defendants of the plaintiff from her store premises.

SASKATCHEWAN.

JOHNSTONE, J. JULY 15TH, 1908.

TRIAL.

NORTON v. CANADIAN BANK OF COMMERCE.

Bankruptcy and Insolvency—Assignments of Moneys to Bank—Bona Fides—Security—Bank Act, sec. 80—Belief of Bank Manager in Solvency of Customer—Book Debts—Moneys to Arise from Future Contracts—Pledge—Consideration—Assignment for Benefit of Creditors—Transaction within 60 Days—Assignments Act, sec. 41—Costs.

Action by the assignee for creditors of the estate and effects of one Broley, a contractor of North Battleford, to

set aside several assignments made by Broley to the defendants.

A. M. Panton, Battleford, for plaintiff.

D. Keith, Battleford, for defendants.

JOHNSTONE, J.:—The first of these assignments was taken by the bank on 19th November, 1906, the effective portion of which is in these words: "The customer hereby assigns and transfers to the bank all the debts, accounts, and moneys now due or owing or accruing due and which may hereafter become due or owing to the customer in respect of the purchase money of goods, wares, and merchandise, or in respect of moneys advanced, lent, or otherwise by the several persons, firms, and corporations to which the customer has sold or may sell goods, wares, or merchandise, or has lent or otherwise advanced or may lend or otherwise advance money, including all others those mentioned in the schedule hereto; and also all contracts, securities, bills, notes, and other documents, now held or which may hereafter be taken or held by the customer or any one for the customer in respect of the said debts," etc. No schedule is annexed to this assignment.

On the date named the bank discounted the personal note of Broley, and placed the proceeds, $1,300, to his credit in his account with the bank.

On 15th June, 1907, Broley, in writing, purported to assign all moneys coming to him under his contract with the trustees of a school district, in these words:—

"North Battleford, Sask.
"15 June, 1907.

"The Trustees of the North Battleford School District No. 1438, North Battleford, Sask.

"This will be your instructions to pay to the Canadian Bank of Commerce, North Battleford, all moneys due or accruing due under my contract with you for the erection of your schoolhouse. W. J. Broley."

From 19th November, 1906, till 1st November, 1907, the account of Broley with the bank was of a fluctuating character; the personal obligations of Broley, in the shape of his promissory note or notes from time to time, with the documents referred to, being the only securities held by

the defendants for advances made by them to the contractor to enable him to carry on his work.

On 1st November, 1907, the indebtedness of Broley to the bank, covered by his promissory note, amounted to the large sum of $9,952.47. On the 16th of this month the bank obtained from Broley additional security for this indebtedness, consisting of an assignment of a house and lot in North Battleford, valued at something like $2,700. On the 18th of the same month the defendants received under the document of 15th June from the school board of North Battleford on account of their contract with Broley, $6,010.72, of which sum $3,425.47 was credited on Broley's indebtedness covered by the said note; the balance of the proceeds of this cheque, with some $400, moneys deposited by Broley, having been applied in the payment of wages and other liabilities already accrued.

On 30th December, 1907, Broley still owed the bank $6,273 on his note of $9,952.47, together with $16.10 overdraft, on which date the bank took from Broley a further assignment of all the debts, accounts, and moneys then due or owing or accruing due or which might thereafter become due or owing to Broley under or by virtue of any contract or contracts or in respect of the purchase moneys of the goods, wares, and merchandise, or for services rendered or to be rendered, or for work aleady performed or to be performed, or for materials already furnished or to be furnished, etc., and particularly those mentioned in the schedule annexed to such assignment. In such schedule is mentioned the contract with the town of Battleford for the construction of a power-house, approximately $3,400. It does not appear from the evidence given at the trial what portion, if any, of this sum of $3,400 had been earned at the time of the assignment. It does appear, however, from Broley's evidence, that the work under the contract was commenced in September or October, and that on the date of the assignment by Broley to the plaintiff for the benefit of his creditors, namely, on 17th January, 1908, there was due under this contract with North Battleford for the erection of the power-house approximately $2,896.80.

It is contended by the plaintiff that all the assignments mentioned were void, for the reason that at the time of the execution of each Broley was in insolvent circumstances, and that the several assignments were executed with the purpose of defeating and delaying his creditors. It was

also contended that the transactions referred to between Broley and the defendants were in violation of the provisions of the Bank Act, and therefore void. The defendants, on the other hand, set up that the assignments were taken in good faith, in the usual course of business, and on the strength of which securities advances from time to time were made by the defendants to Broley; that the assignment of November, 1907, was taken by way of additional security under sec. 80 of the Bank Act; and it was further urged that the allegations as to the insolvency of Broley, and that the assignments were taken for the purpose of defeating, defrauding, and delaying his creditors, were not true.

In view of the conclusion at which I have arrived as to the bona fides of the several transactions, it becomes unnecessary to discuss at length the question of the insolvency of the assignor Broley, further than to say that he was undoubtedly unable to pay his debts in full on 1st November, 1907. He was then insolvent. The transactions I find entered into with the defendants prior to 30th December, 1907, were so entered into by them with the utmost good faith, the very fact of advances having been made by the bank to Broley of large amounts of money prior to 1st November, 1907, on the securities then held by them, convinces me of the sincerity of the bank manager in the belief of the solvency of Broley. From the statement of the assets and liabilities of Broley submitted to the manager of the bank and at the meeting of his creditors, and from Broley's evidence, it would appear that Broley himself was not then aware of the extent to which he had become involved. The bank, certainly, were ignorant of the true state of Broley's financial position until, possibly, the meeting of his creditors. As a further consequence of the bona fides of the transactions, and of my view of the law governing all transactions with the bank, the question of the solvency or insolvency of Broley is immaterial, save as to the transaction of 30th December. There was no intention to defeat or delay other creditors, or to prefer the claims of the bank in the giving or in the taking of the assignments up to and inclusive of 16th November. None of the transactions entered into was expressly prohibited by the provisions of the Bank Act. That of the 16th November, the taking of the assignment of the house and lot in North Battleford, was authorized by sec. 80. Assignments by way of security of book debts not existing at the time of the assignment

(and of moneys arising from future contracts) are valid so as to give to the assignee a good title to them when they come into existence. Lord Herschell in Tailby v. Official Receiver, 13 App. Cas. 523, at p. 527: "Choses in action do not come into the scope of the Bills of Sale Acts, and, though not yet existing, may nevertheless be the subject of assignment." Lord Watson remarks (at p. 533): "The taking of such assignments by a bank as security for advances is not expressly prohibited by any provision of the Bank Act, and the Bank may advance moneys on the security of such." See Rennie v. Quebec Bank, 3 O. L. R. 541; Molsons Bank v. Carscaden, 8 Man. L. R. 451; Rolland v. La Caisse d'Economie, 24 S. C. R. 405. Assuming that the statute did not authorize the bank to effect loans on the pledge of such securities, this fact might affect the pledge as regards the rights of third parties under the securities pledged, but Broley having received good consideration, namely, the advances, he could not, nor could his creditor, impugn the contract to repay or be admitted to assail the pledge: Rolland v. La Caisse d'Economie, 24 S. C. R. 405.

The taking of the assignment of 16th November was a transaction authorized by sec. 80 of the Bank Act: Re National Bank of Australia, L. R. 3 P. C. 299, at p. 307. As to the assignment of 30th December, I must hold this to be null and void as made contrary to the provisions of the Assignments Act. It is provided by sec. 41 of this Act that, subject to the provisions of sec. 44, etc., every assignment, etc., of goods, chattels, effects, or of bills, notes, or securities, or of any other property, real or personal, made to a creditor by a person at any time when he is in insolvent circumstances or unable to pay his debts in full, or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference, etc., shall, if the debtor within 60 days after the transaction make an assignment for the benefit of his creditors, be utterly void. It is provided by sec. 44 that sec. 41 shall not apply to a bona fide assignment made in consideration of any present actual bona fide payment or advance of money. The defendants did not set up in their defence that any moneys had been advanced by them in consideration of the assignment referred to, nor was any proof offered at the trial that any advance had been made, and, moreover, it appears from the books of the defendants, produced at the trial, that no advance had been made by them to the defendants either on

30th December or at any other time between such date and 17th January, when Broley assigned to the plaintiff. The evidence does not disclose that any portion of the moneys assigned by the document referred to was yet to be earned; the transaction therefore comes clearly within the provisions of sec. 41 of the Assignments Act, and is void.

Blakely v. Gould, 24 A. R. 153, 27 S. C. R. 687, was cited by the defendants' counsel, as authority for his contention that the assignment just mentioned was not open to be attacked under the provisions of either the Statute of Elizabeth or of our Assignments Act. I cannot accede to this contention. In the case referred to nothing had been yet earned under the contract assigned, whereas in the case before me, as has already been stated, considerable work had been done by the contractor under his contract with the corporation of North Battleford prior to the time of the assignment of such contract, and the moneys so earned were assigned to the defendants, together with those not earned, if any.

As to the assignments of 19th November, 1906, 15th June and 16th November, 1907, there will be judgment for the defendants. As to the assignment of 30th December, 1907, there will be judgment for the plaintiff, and this assignment will be and the same is hereby declared null and void and of no effect. In giving judgment for the defendants as to the prior assignments, I do not wish to be understood as holding that the defendants, under the assignment of 19th November, 1906, would be entitled to the moneys under or through Broley's contract with the town board or the corporation of North Battleford on account of the power in the contract. [illegible] effect of the document was [illegible] assignments to be good and valid [illegible] determining the rights of the parties [illegible] will be costs to the defendants [illegible] they earned, and [illegible] conditions [illegible]

ALBERTA.

STUART, J. JULY 31ST, 1908.

TRIAL.

GORMAN, CLANCEY, & GRINDLEY v. ARCHIBALD.

P. ANDERSON & CO. v. ARCHIBALD.

Mechanics' Liens—Lien for Materials—Time for Filing—Time of Supplying Last Material—"Ceased to Furnish Materials"—Interest in Goods Supplied—Certificate of Lis Pendens—Time of Filing—Error of Registrar—Entry in Day Book—Meaning of "Filing"—Taking Promissory Note—Effect on Lien—Sum Due from Owner to Contractor—Evidence—Onus.

Actions to enforce mechanics' liens.

C. F. Newell, for the plaintiffs in the first action.

J. C. F. Bown, K.C., for the plaintiffs in the second action.

J. E. Wallbridge, for the defendant Archibald.

H. L. Landry, for the Traders Bank, third parties.

STUART, J.:—Referring first to the case of Gorman, Clancey, & Grindley, I have come to the conclusion that none of the objections taken by the defendant can be sustained. I think it is clear that the materials supplied by these plaintiffs were supplied to Copp, the contractor, under one general arrangement, and, as the prismatic glass was plainly supplied at some date subsequent to 2nd December, and the claim of lien was filed on the 14th of the same month, the result is, according to the authorities, that the lien must stand good for all of the materials supplied.

I am of opinion, also, that the plaintiffs had such an interest in the goods supplied as would entitle them to file a lien under the Act. It is clear upon the evidence that the Dominion Bridge Company held the plaintiffs liable for the price of the goods, and I think this is quite sufficient to give the plaintiffs such an interest as would entitle them to take advantage of the provisions of the Mechanics' Lien Act.

It was further objected by the defendant that the certificate of lis pendens was filed too late. A clerk in the office of the plaintiffs' solicitors had, it appeared, taken the certificate of lis pendens to the land titles office shortly before 4 o'clock on 13th January, 1908, which was the last day for filing the certificate under the provisions of sec. 35 of the Act. A stamp containing the date of receipt was made upon the certificate by the official receiving the same at the desk. It did not, however, appear that any entry had been made in the day book on the 13th, the official who was called to give evidence on the point not having any clear memory as to whether the entry in the day book was made on the 13th or the 14th. The certificate of the registrar, however, was not indorsed until the 14th; this certificate was afterwards cancelled by the direction of the registrar, and a new certificate indorsed upon the certificate of lis pendens, to the effect that the lis pendens had been registered at 3.50 o'clock p.m. on the 13th.

The interpretation clause of the Mechanics' Lien Act contains no interpretation of the word "filed." The interpretation clause of the Land Titles Act says that the word "filing" shall mean in that Act "the entering in the day book of any instrument." In my opinion, however, it does not necessarily follow that this interpretation must be given to the word in the Mechanics' Lien Act, especially in view of the fact that in various sections of the Act, e.g., sec. 13, the word "filing" is used with reference to the office of the clerk of the Court. There is, of course, no such thing as a "day book" in the office of the clerk of the Court, and the word must receive a different meaning, at any rate in respect to what is to be done in that office. I do not think, moreover, that such a strict interpretation of the word should be given in this case as, perhaps, might be necessary if there were a contest between two incumbrancers claiming priority against each other; no such question as that arises here. The plaintiffs did all that they could be expected to do in handing the certificate of lis pendens to the proper official. That official stamped the date of receipt upon it, and, while I think it may possibly be inferred from the evidence that the entry in the day book itself was not made until the next day, this is not quite clear. Even, however, if it was not done until the next day, I do not think the plaintiff should be prejudiced by the failure of the registrar to perform his duty. At any rate they should

not be prejudiced as against the defendant, whatever might have been the situation if the rights of the rival incumbrancer who had been misled by the registrar's error had been in question.

As to the last objection, I think the only fair inference to be drawn from the evidence is that the materials in question were in fact supplied and went into the building.

For these reasons, I think these plaintiffs are entitled to a declaration that they have a lien upon the property in question for the sum of $1,889.27, together with the costs of action to be taxed.

With respect to the claim of P. Anderson & Co., I think these plaintiffs are also entitled to succeed. The whole case depends simply on a question whether the delivery of 3,000 brick on 7th December was sufficient to keep alive the lien of the plaintiffs with respect to the previous deliveries. Whatever may have been the motives of Copp in giving the order for this last delivery of brick, it was not shewn that Anderson acted otherwise than in perfect good faith in accepting the order and filling it when he was requested to do so. There is nothing to shew that the general arrangement which was made in the beginning for the supply of brick was understood by Anderson and Copp to have come to an end at the date of the giving of the note. It is clear that more bricks were still required for the completion of the building, and that the general arrangement made in the beginning for the supply of brick was intended from the first to continue in force until the bricks required had been supplied. For these reasons, I do not think that the plaintiffs had, prior to 7th December, "ceased from any cause to place or furnish materials," within the meaning of sec. 13 of the Mechanics' Lien Act.

With respect to the giving of the promissory note of 29th November, I have nothing to add to what I have said in the case of Swanson v. Mollison, 6 W. L. R. 678, and, for the reasons there given, I do not think the taking of the note has destroyed the plaintiffs' right to a lien.

With respect to the objection that the onus was upon the plaintiffs to shew that there is a sum of money owing by the owner to the contractor out of which these liens can be realized, I am of opinion that the plaintiffs were not bound in the first instance to adduce evidence of this fact. It seems to me that the intention of the Act is that this should

be a matter of defence. It is a matter which should be peculiarly within the knowledge of the owner, and it is a matter which he can easily prove.

For these reasons I think these plaintiffs are entitled to a lien upon the property mentioned in the statement of claim for the sum of $1,490 and costs of action.

ALBERTA.

STUART, J. JULY 31ST, 1908.

TRIAL.

VANSTONE v. SCOTT.

Sale of Goods—Conditional Sale—Repossession and Resale by Vendor—Action for Deficiency in Price Realized—Ordinance respecting Hire Receipts and Conditional Sales, sec. 8—Exercise of Power of Resale—Failure to Serve Notice on Purchaser Personally—Resale without Reserve and at Undervalue—Suspicious Circumstances.

Action to recover a balance due upon lien notes given for the price of a horse.

F. C. Jamieson and A. Y. Mode, for plaintiffs.

J. R. Lavell, for defendant.

STUART, J.:—I am of opinion that this action must be dismissed, if not upon any other ground, at any rate on the ground referred to by me at the close of the argument.

The action is to recover the sum of $1,598.55, being the balance alleged to be due upon certain lien notes given by the defendant to the plaintiffs upon the alleged sale of a stallion, after deducting the net proceeds of a sale of the stallion, which had been held by the plaintiffs after a repossession of the stallion. Leaving aside the question as to whether the parties were ever agreed as to the identity of the real estate upon which the mortgage was to be given as collateral security, about which point I have considerable doubt; and leaving aside also the question as to whether there ever was in fact a delivery of the stallion, as

to which I think probably the decision would have to be in favour of the plaintiffs upon the facts; there remains the very grave question as to whether, in the circumstances of the case, the auction sale of the animal can be upheld as a valid and proper sale as against the defendant. In my opinion, it is impossible for the plaintiffs to contend that the sale was properly conducted. In the first place, it will be observed that the only notice of the sale given to the defendant was by mailing a registered letter addressed to him at his last known post office address, namely, Strathcona.

Section 8 of the Ordinance respecting Hire Receipts and Conditional Sales of Goods says: "The goods or chattels shall not be sold without 5 days' notice of the intended sale being first given to the buyer or bailee or his successor in interest. The notice may be personally served or may, in the absence of such buyer, bailee, or his successor in interest, be left at his residence or last place of abode, or may be sent by registered letter deposited in the post office at least 7 days before the time when the said 5 days will elapse, addressed to the buyer or bailee or his successor in interest at his last known post office address in Canada."

In my opinion, the proper interpretation of this section is that if the vendor proceeds to sell under the power given in the agreement he must personally serve the buyer if it is reasonably possible for him to do so, and that it is only in the absence of the buyer that he may be served by leaving the notice at his residence or by registered letter. There was nothing in the evidence to shew that the defendant could not have been served personally, or that he was absent from home. In my opinion, therefore, the provisions of sec. 8 were not complied with, and the sale was for this reason invalid.

But there are other reasons pointing to the same conclusion. The alleged sale to the defendant was for the sum of $2,000, and independent witnesses who were called swore that the animal was well worth that sum; notwithstanding this, at the auction sale the animal was sold for $425; as one witness said, "the horse was given away on the day of the sale."

In Jones on Chattel Mortgages, sec. 708, it is said: "The creditor will be held, at his peril, to deal fairly and justly with the property, both as to the time of the notice and

the manner of the sale. Although it appears that he took pains to secure the best price practicable for the goods, and that they were sold for their value, and that the mortgagor assented to the prices obtained, yet if he can prove that they were sold unfairly, or at an under price, he will be permitted to do so, and will be allowed their full value."

In Barron & O'Brien on Chattel Mortgages, the same principle is laid down. It is said, p. 78: "A mortgagee with such a power stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor for any surplus that may remain." And again on p. 79 it is said: "A mortgagee, who has advertised under his power of sale, has the right, in the interest of all parties, to adjourn the sale from time to time. Indeed, if a mortgagee does not do so, and the property, by reason thereof, is wilfully sacrificed, or, from negligence in the mortgagee, the sale fails to realize enough to pay off the mortgage debt, it will be a good defence in an action to recover the balance of such debt, that if the sale had been bona fide the property would have been sold for more than enough to pay the debt."

In the present instance the plaintiffs did not take precaution to protect the defendant by fixing a reasonable reserve bid, but the sale was made without reserve and at a ridiculously low price. It is, therefore, clear that owing to the default of the plaintiffs in not taking proper measures to protect the interest of the defendant by fixing a reserve bid and by postponing the sale when it appeared that a fair price could not be secured, they did not do their duty in their character as trustees for the defendant, and should not be allowed to recover the deficiency for which they sue.

I think it proper to add that there is an additional circumstance which has raised grave suspicion in my mind, and that is the fact that the man Shaver who bought the horse for $425 was the man who had been employed by the plaintiffs to serve the notice of seizure, and who had been working around the livery stable where the horse had been kept by the plaintiffs; and, in addition to this, there is a further cause for suspicion in the fact that the horse was loaded on the cars at Strathcona the very night of sale and hurried away out of the country. For these reasons the action must be dismissed with costs.

YUKON TERRITORY.

JULY 14TH, 1908.

FULL COURT.

NOVAK v. ABRAHAMS.

Covenant—Restraint of Trade—Sale of Goodwill of Business —Informal Document—Admissibility of Parol Evidence to Supplement—Operation of Covenant—Time and Place —Assignment of Covenant—Parties—Injunction—Damages.

Appeal by defendant from judgment of CRAIG, J., 7 W. L. R. 222.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. T. Congdon, K.C., for defendant, appellant.

F. J. McDougal, for plaintiffs.

MACAULAY, J.:—This is an appeal from the judgment of Mr. Justice Craig delivered on 27th November, 1907, and the facts of the case are fully set out in the judgment of the learned trial Judge.

The action was for damages and an injunction for breach of covenant contained in an agreement of sale of goodwill of a wood business. The clauses of this agreement that we need to consider for the purposes of this appeal are:—

"1st. And the second party agrees to take the wood the first party has on hand at the present cost (purchase price) to be paid as delivered by second party.

2nd. And it is agreed by the party of the first part that he will not enter in the wood business unless by consent of second party."

I will first deal with the clause affecting the wood the party of the first part had on hand at the time the agreement was entered into between the parties.

The evidence shews that some 65 cords of wood which the defendant, the party of the first part, had on hand at the time of the sale to the plaintiffs, had not been taken

over by the parties of the second part as provided in the agreement of 15th September, 1906, and it was argued before us that on the principle that the party who seeks redress should be in good standing himself, the plaintiffs could not succeed in this action, because they had violated one of the terms of the agreement in not taking over the aforesaid 65 cords of wood.

Very little evidence was offered on this point, but the plaintiff Novak swears he was willing to take over the wood at the cost price as provided in the agreement, and that the cost price of said wood was $6 per cord, but the defendant refused to deliver the wood to him at said price, and demanded $10 per cord for the same, which he refused to pay, and this evidence is in no way contradicted. True, the plaintiff Novak did not express himself in the words I have used, but what I have said is the substance of his evidence, and on that evidence it would appear that the reason the wood was not taken over as provided by the contract was owing to the refusal of the defendant to deliver it according to the terms of the contract, and not through the neglect or default of the plaintiffs.

The next clause of the agreement which we are called upon to consider is really the crucial point in the case, and it was contended by counsel for the appellant that this clause, by which the defendant agreed not to enter into the wood business unless by consent of the plaintiffs (I use the expression "plaintiffs" as the partner of the original plaintiff was added a party plaintiff by the trial Judge), being unlimited in time and space, is wholly in restraint of trade and contrary to public policy, and therefore void.

Many authorities were cited and are to be found on this point, and are not without a very considerable conflict of opinion in the views expressed by the different Judges who delivered the judgments. The learned trial Judge was of opinion that the parol evidence offered him at the trial, and which was received without objection, clearly established the fact that the parties to the agreement were all residents of Dawson, and that the wood business intended to be conveyed was a wood business carried on in Dawson, and that the clause providing that the defendant was not to enter into the wood business, unless by consent of the plaintiffs, meant that he would not enter into the wood business in Dawson without the consent of the plaintiffs, and, on the

authorities cited by him, he amended the agreement accordingly, and then, having come to the conclusion that the restraint was not unreasonable, he held the agreement to be valid.

If the trial Judge was right in introducing parol evidence to explain this agreement, and I am of opinion that he was right in so doing, then I think under the authorities he was warranted in holding the agreement valid. But, apart from the oral evidence, I think we have a right to look at the agreement as we find it, and see what is the reasonable construction to be placed upon it.

In Duboski v. Goldstein, [1896] 1 Q. B. 478, Lord Esher, at p. 481, says: "It is an ordinary canon of construction that the meaning of words in an agreement, which, taken by themselves, are quite general, may be confined to a particular subject matter with which the parties were dealing. Here I think the parties to the agreement were dealing with the business then carried on by the plaintiff in Whitechapel and St. George's in the east, and the scope of this agreement will be limited by reference to that locality."

In the case before us, although the agreement does not shew where the business is carried on, except that it defines it as being carried on at No. 111, Third avenue south, the only conclusion a reasonable mind can arrive at, is, that it was meant to describe the business as being carried on at No. 111, Third avenue, South Dawson; and, that being the case, although it is not limited as to time, I think the trend of the great majority of the later cases is to hold that, if the restraint is not unreasonable, the agreement is valid.

Cotton, L.J., in Davies v. Davies, 36 Ch. D. at pp. 379 et seq., in a strong judgment, takes the opposite view, which is opposed by Fry, L.J., in the same case, the last named being the Judge who decided the case of Rousillon v. Rousillon, 14 Ch. D. 351. The majority of the Judges, however, have preferred to adopt the views expressed by Fry, L.J., in Rousillon v. Rousillon, rather than those of Cotton, L.J.

The case of Maxim Nordenfelt Gun Co. v. Nordenfelt, [1893] 1 Ch. 630, is a strong decision in favour of the latter view, shewing the change that has taken place in the views formerly held in regard to this question.

There is evidence that there was, at least, one other wood dealer in Dawson, and I am of opinion, on the whole, that this clause in the contract, considering all the circumstances, is not so unreasonable as to be held to be invalid. Having come to that conclusion, I think the evidence clearly shews that the defendant, if he did not actually enter into the wood business himself, which I am strongly inclined to think he did, at least used all his influence in securing customers for Mahon, who was his partner in other ventures, and endeavoured, as far as possible, to attract his old customers to deal with Mahon, and not to deal with the plaintiffs.

The amount of damages awarded was not excessive, and I am of opinion that the injunction should be maintained, and that this appeal should be dismissed with costs.

DUGAS, J.:—I regret to have to enter a dissent in this case. The contract between the parties was in restraint of trade, and I find that there is so much vagueness in the agreement, in the statement of claim, in the statement of particulars, and the proof, that I cannot bring my mind to a conclusion in favour of the respondents.

This restraint consists in the undertaking on the part of the defendant not to go into the wood business again wihout the consent of the purchasers. In suing, this necessitated an averment on the part of the latter that "the defendant had entered into the wood business again without such a consent."

At p. 29 of vol. 2 of the Am. & Eng. Encyc. of Law a number of cases are cited where it is maintained that the proof of such negative matters rests upon the plaintiff generally, who, at least, has to make a prima facie case in that behalf in order to shift the burden upon the defendant. I think that the law is very clear on the point. The plaintiffs should have made of it a special averment, and, in this particular case, a straight proof of no consent having been given. They do not do so. Novak in answering certain questions only gives us a vague idea that he did not consent, by saying that he told the defendant to stop dealing in wood; but this does not prove that the consent was not given before.

In their statement of particulars the plaintiffs say that they have suffered damage by reason of the acts of the

defendant complained of in the statement of claim in this action. The breaches of said agreement mentioned in the statement of particulars are, amongst others, the sale of wood to Mrs. Hiel, Mrs. Shiner, Mike Stone, and others, and by reason of the defendant advertising himself as a wood dealer and in carrying on a wood business in Dawson. There again there is no negative averment.

The proof does not satisfactorily shew the space within which the defendant's business was carried on, and within which he should be restrained from continuing the same.

The learned trial Judge permitted the plaintiffs to go, and I think rightly, beyond the terms of the contract, and to prove within what area they were doing business. Even with the proof it is not clear where the business existed exactly; whether only within the limits of Dawson or how far outside. The proof only refers to the business carried on at 111 Third avenue. This does not properly establish the area.

The defendant had some wood at Mooschide, outside of Dawson (about 65 cords). Whether this formed part of this business or not is not clearly made out.

The authorities do not seem to be always clear as to the principles which should now govern such agreements in restraint of trade. In the case of Duboski v. Goldstein, [1896] 1 Q. B. 478, the Judges seem to have been influenced by the fact that the prohibition to interfere was limited to present and future clients, though one of the Judges thought that the contract should be severed and the injunction applied only to clients existing at the time of the contract.

This shews that some consideration has to be given still to time and space, notwithstanding the special case of Maxim Nordenfelt Gun and Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630.

Upon the whole I think that the plaintiffs have not made their case properly, and I would be in favour of maintaining the appeal.

Appeal dismissed, the Court being divided.

YUKON TERRITORY.

JULY 18TH, 1908.

FULL COURT.

BARRETTE v. CANADIAN BANK OF COMMERCE AND SYNDICAT LYONNAIS DU KLONDIKE.

Banks and Banking—Collateral Security Deposited with Bank to Secure Payment of Promissory Notes and Advances—Memorandum of Hypothecation—Judgment—Settlement—Account—Fiduciary Relationship—Trustees—Breach of Trust—Failure to Exercise Due Diligence in Realizing Securities—Bona Fides—Tender of Reconveyance—Laches—Interest—Rate of—Overpayment—Illegal Rate—Contract—Pass-book—Estoppel—Parties—Costs.

Appeal by the defendants the Canadian Bank of Commerce from the judgment of CRAIG, J., delivered 8th February, 1908, 7 W. L. R. 659, and from a supplementary judgment delivered by him on 2nd March, 1908.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. J. Stacpoole, for the appellants.

Henry C. Bleecker, for defendants Le Syndicat Lyonnais du Klondike.

F. T. Congdon, K.C., and J. B. Pattullo, K.C., for plaintiff.

MACAULAY, J.:—There is very little dispute, if any, on the facts, and, after examining the evidence and exhibits on this appeal, I have no hesitation whatever in confirming the learned trial Judge generally in his findings of fact.

The defendant bank in their statement of defence in this action endeavour to take two positions, viz., that of trustees under the assignment of Barrette to them, and claim that as such trustees they acted bona fide and providently in the interest of the cestui que trust, and as a prudent man of business would manage his affairs. They also take the position that under the hypothecation agreement of 22nd June, 1901, they had the right to make any compromises they

chose without any reference to the plaintiff; neither of which positions they fairly take in their pleadings. Clearly the position cannot be maintained that under the hypothecation agreement they had the right to make the compromise they did make, as the defendants the Syndicat Lyonnais had ample means of satisfying the full amount of the judgment obtained against them, and actually were permitted to draw down some $9,000 odd that had been deposited in Court. This is such a plain proposition of law that it is useless to cite authority in support of it.

If, on the other hand, they acted as trustees for the plaintiff, and it is impossible for the defendants to escape this position, were they justified in making the compromise? It was urged by counsel for the bank that under the order of 6th May, 1903, which order contains the terms of the settlement between the defendant bank and the Syndicat Lyonnais, the rights of the plaintiff in the action were preserved to him. What were the rights of Barrette, the present plaintiff, in that action? His only rights were to pursue his appeal on the judgment obtained against him on the counterclaim, which rights he could pursue independently of the bank, and which he did pursue, and on which he eventually succeeded before the Privy Council; and his right to proceed in the name of the bank and recover the balance coming to him on the judgment obtained against the Syndicat Lyonnais after the claim of the bank had been satisfied; and it is admitted that the balance due him on that judgment, after the bank's claim had been satisfied, was about $25,000.

True, the bank obtained judgment against Barrette for the sum of $101,204.15, to which they were not entitled, and which they obtained by altering the approved minutes of judgment and substituting new minutes, which misled the Judge making the order, and which said judgment was set aside, although the application to set the same aside was strenuously opposed by the bank; such conduct, in my opinion, being highly improper and unworthy of the bank and their solicitors.

The judgment obtained in the suit of the bank against the Syndicat Lyonnais for $101,204.15 was set aside by a consent order made by Craig, J., on 6th May, 1903, the consent being signed by Messrs. Clark, Wilson, & Stacpoole, solicitors for the bank, and by Messrs. Bleecker & DeJournel,

solicitors for the Syndicat Lyonnais, Craig, J., having been the trial Judge who had pronounced the original judgment.

It was argued by counsel for the bank that so much of this order as purported to set aside the original judgment was null and void, and of no effect, and in support of such contention he cited the case of The Bell Cairn, 54 L. J. P. & A. 88, and 55 L. J. P. & A. 3. The learned Judges who heard that application in the first instance, and on appeal, were all of opinion that the order made by the registrar to set aside a judgment obtained by consent of parties was null and void, but they stated that had the order been made by the Judge before whom the judgment was obtained in the first instance it might have been valid. Lord Esher, M.R., doubted the power of the trial Judge to set aside the judgment unless for fraud. Cotton, L.J., was of opinion that the trial Judge could, by consent of the parties, set the judgment aside. In the case of Canadian Bank of Commerce v. Le Syndicat Lyonnais above mentioned, it was the trial Judge who made the order setting aside the judgment, and, even if the judgment was not legally set aside, it was settled by the order of 6th May, 1903, and could not be proceeded upon again, and the Bell Cairn case is authority for this proposition of law.

The action upon which the bank obtained judgment against Le Syndicat Lyonnais was brought upon the note given by Le Syndicat Lyonnais to Barrette, and the mortgages given as collateral thereto, and assigned by Barrette to the bank; and I am of the same opinion as the trial Judge, that the securities having been sued upon and judgment obtained upon them, they became merged in the judgment, and that judgment having been settled between the bank and the syndicat, Barrette could not now proceed against the syndicat upon these securities. Counsel for the bank, however, argued that the securities were not merged in the judgment, and the bank still held the same unimpaired, and were now willing to hand them over to the plaintiff, but could not safely have done so until after the judgment of the Privy Council in that case had been pronounced and made a judgment of this Court.

On the hearing before us I asked if any evidence had been submitted shewing the value of the securities at the date of the judgment of the Court en banc here, and at the time the judgment of the Privy Council became a judgment of this Court, and it was admitted by counsel for all

parties that no such evidence had been offered at the trial of this action. I then stated that I thought we should direct that evidence should be taken on this point, as the Court was entitled to be possessed of all the facts in connection with this case, and, on considering the case, I became further convinced that such evidence should be given if it could be obtained, and, although from the view I personally take of this case such evidence would not affect my judgment, still, after a conference with my brother Dugas, we decided to direct that such evidence be taken in open Court before us in the presence of counsel, under Rule 515 of our Judicature Act as amended, and the evidence so taken shews that the chattel securities have almost wholly disappeared, and at the date of this trial were practically valueless, and that the mining securities have become very much depreciated in value, as the mining claims had been almost wholly worked out by the placer mining methods before the date of this trial; but these securities were valuable in the month of February, 1903, when judgment was first rendered in the case of Canadian Bank of Commerce v. Syndicat Lyonnais et al.

At the time of the settlement between the bank and the Syndicat Lyonnais the plaintiff Barrette in this action, who had reposed the utmost confidence in the bank, and had placed himself entirely in their hands, was studiously excluded from participating in that settlement, and, notwithstanding the objections raised by his solicitors, the settlement was proceeded with, and all information regarding the same withheld from him.

The evidence shews that the settlement was made without advice of counsel, as found by the trial Judge, notwithstanding the efforts of the bank to shew that it was made upon such advice. All attempts of Barrette and his solicitors to obtain a statement from the bank were unsuccessful, and, even after the judgment of the Privy Council became a judgment of this Court, the bank refused to proceed against the syndicat to obtain the balance due to Barrette, or to assign the securities to him to enable him to proceed. They now attempt to justify their position by saying that they did not obtain the full amount of their indebtedness from Barrette in the settlement with the Syndicat Lyonnais, and that until he paid the balance they were entitled to retain the securities, when, by their settlement with the Syndicat, they could not have taken any further action upon

them. And also Mr. Cameron, the local manager of the bank, in his letter of 17th July, 1904, marked as exhibit "M" in this action, to Messrs. Pattullo & Ridley, Barrette's solicitors, states that "the bank are not making any demands upon Barrette."

The learned trial Judge found the bank guilty of wilful default in their dealings as trustees with Barrette, and therefore liable to damages, and I think he was fully justified in arriving at that conclusion.

Many authorities were cited by the trial Judge in support of his view, in which I entirely concur, and it is therefore unnecessary for me to deal further with the cases cited to us on this point on the argument, nearly all of which are referred to in the judgment of the learned trial Judge.

The question of the rate of interest charged was settled by this Court in the case of Benallack v. Bank of British North America, and our decision in that case followed in other cases, and is, therefore, binding upon us. In that case we held shortly that where interest was paid voluntarily, no matter what the rate, it could not be recovered back; but where not so paid the bank were only entitled to charge interest at the rate of 7 per cent. per annum; and, as I understand it, that is the view the trial Judge has adopted in this case.

The judgment appealed from should be amended by striking out the words "trustee for" in second line of the first declaration and by inserting after the words "liable to" in said second line the words "account to," as applied for on the argument.

I am of the opinion, therefore, that the judgment should be confirmed, and that the appeal should be dismissed with costs. No costs allowed to either party for obtaining further evidence submitted this day.

DUGAS, J.:—There are documents in the record referring to my personal position, and to some of my actions in the present case, about which I think it is but right that I should give some explanation.

After the disposal by this Court en banc of the case of Canadian Bank of Commerce v. Syndicat Lyonnais du Klondike and Barrette, and when the parties were no more before us, Mr. O. H. Clark, of the firm of Clark, Wilson, & Stacpoole, who had all through acted for Barrette as well as for the bank, and who was still representing himself as act-

ing in Barrette's interest, came to me and asked me to mention to Barrette that the syndicat were offering $3,000 in settlement of all claims, the bank having been satisfied otherwise by the syndicat. I could see that Mr. Clark was anxious that Barrette should accept, and I supposed then, as I do now, that he thought I could influence Mr. Barrette in that behalf. Mr. Clark continued to call upon me at different intervals, and each time mentioned larger sums which the syndicat would consent to pay, and this until he reached $15,000. I do not remember whether in each case I spoke to Mr. Barrette of the offers made, though I am certain that I mentioned that of the $15,000, but in no instance did I advise him to accept or to refuse.

I think that it was at about that time that Mr. Clark severed his connection with the firm of Clark, Wilson, & Stacpoole, and left the Territory, and I suppose that it is on that account that Mr. Stacpoole himself spoke to me about the matter. Barrette having told me that he would accept the $15,000, provided all costs were paid, I did really mention to Mr. Stacpoole, as I thought then, confidentially, that perhaps the bank would find some advantage in paying those costs, as it would free them from any further litigation as to their obligation to reimburse illegal and compound interest charged to Barrette and paid by him, and varying from 9 to 30 per cent.

I did say to Mr. Stacpoole that I had (as I still have) doubts upon the question, but in speaking so to Mr. Stacpoole I never intended to prevent any settlement or to interfere in any way in the same. I only discussed this matter, as often it is done in similar and other circumstances between Judges and members of the bar; and if, in any way, I shewed some interest during the calls made upon me by either Mr. Clark or Mr. Stacpoole, it was rather in favour of the bank, which I thought would be benefited by any such settlement if made; and, therefore, when Mr. Cameron, in one of his letters to his superiors, says that I was interesting myself "in an unwarranted and anything but judicial manner in endeavouring to have the case settled to Barrette's advantage," he simply makes a false statement. He, besides, refers to the relations existing between some of my family and Mr. Barrette, and doubts, for that reason, my impartiality between the bank and Barrette. I may say that all through I was kept under the impression that the bank were remaining truthful to Bar-

rette, and that they still looked for his interests, as also Mr. Stacpoole, his counsel. I did not know then that both had so betrayed their trusts by turning their backs to him without even an honest warning; and I was far from dreaming that where my services were so sought it was to have the occasion of keeping a sort of "lying in wait" on me for reasons which I cannot understand, as it would appear by the notes carefully kept of my conversations with Mr. Stacpoole, and the kind of satisfaction which he shews in minutely reporting the same, even when I had asked him to consider them as confidential between ourselves.

Being personally concerned, I will not qualify this action of Mr. Stacpoole, and will leave it to his own conscience to consider whether his action, which I must admit has been very painful to me, was strictly correct, though I will express regret for the Bench and for the Bar that this should have happened, as it tends to lessen the good relationship of both and to make the former mistrustful in its dealings with certain lawyers.

It must be at about that time that an application was made before me to annul and set side the judgment termed by the learned Judge who signed it a "snap judgment," in the case of the bank against the syndicat and Barrette. Mr. Justice Craig was then absent from the Territory. My view was that the judgment as against Barrette was absolutely null. However, I did not feel like interfering in the matter, and I thought that I should refer the question to the Judge whose good faith had been surprised. This necessarily delayed the issue for some months.

When, on account of having expressed those views to Mr. Stacpoole, my impartiality is doubted by Mr. Cameron, my answer to the same is my refusing to make an adjudication, by referring the application to Mr. Justice Craig himself.

In that first case of the bank against the syndicat and Barrette I personally knew of some facts which were falsely stated by some of the witnesses. On that account I did all I could not to sit when the case came before us; not because of the relations existing between some of my family and Barrette, and which is not, under the law, a cause of disqualification, but because I did not feel at ease to sit in a case where I knew of some perjury; and I may declare here that whatever friendship may have existed, and may exist, between Mr. Barette and myself, was not closer than that which I thought

then existed between myself and Mr. Cameron, and the counsel for the bank. In this limited society the Judges are daily exposed to meet litigants with whom they are on terms of very close social relationship; which never, I am proud to say, interfere with the due accomplishment of their duties.

Feeling that my mind was as free in this case as in any similar case, I thought it would be against my duty to yield to the suggestion which was made on behalf of the bank in this present case, to make a declaration that I did not desire to sit thereon. However, as my brother Macaulay is of the opinion that the judgment of the learned trial Judge should be confirmed, to put the parties perfectly at ease in the matter, I will refrain from expressing any opinion as to the merits of the case, otherwise than by concurring to give effect to the judgment of Mr. Justice Macaulay.

SASKATCHEWAN.

LAMONT, J. AUGUST 3RD, 1908.

TRIAL.

RUTLEDGE v. ASTELL.

Slander—Proof of Defamatory Words—Pleading—Variance—Words Affecting Plaintiff in his Trade—Not Necessary to Prove Special Damage—Damages—Costs.

Action for slander.

R. W. Shannon, Saskatoon, for plaintiff.

H. L. Jordan, Saskatoon, for defendant.

LAMONT, J.:—The statement of claim charges the defendant with uttering two slanderous statements:—

"1. That on or about the 13th day of August, 1907, the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said business as a horse dealer the following words: 'Don't buy any horses from that man; his horses are drugged, and when you have them a while they go down:' meaning thereby that the plaintiff cheated or was guilty of fraudulent, corrupt, and dishonest practices in his trade.

"2. That on or about the 24th day of August the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said business as a horse dealer the following words: 'I wouldn't have anything to do with his horses; they are drugged, there is antimony in the drugs and it swells them, but when you work them they go down. There is a grey horse there that has been returned to him twice;' meaning thereby that the plaintiff was guilty of fraudulent and dishonest practices in his trade."

As to the first count, Elizabeth Goodall testified that in August, 1907, the defendant was at her house for dinner, and that upon learning that they were going to buy a team of horses from the plaintiff the defendant said: "He drugged his horses and when they were fed as an ordinary horse they would go down." The defendant admitted being present on the occasion referred to, but denied using the words set out in the statement of claim or the words sworn to by Elizabeth Goodall. He said that on that occasion they did not discuss the plaintiff's horses at all.

As to the second count, John Goodall, father of Elizabeth Goodall, testified that he went to the plaintiff's stable to buy a team of horses; that the plaintiff was not at home; that he saw the defendant, whose place adjoins the plaintiff's stable, and he asked the defendant if he knew anything about the plaintiff's horses, and that the defendant said in reply that "he would have nothing to do with his (plaintiff's) horses, that his horses were drugged, that they were blowed up with antimony, and would go all to pieces." He then asked the defendant about a grey mare plaintiff had, and defendant said "that he knew the mare and that she had been returned several times." The witness gave the date of this conversation as the month of June, but in this I am satisfied he was mistaken, as other portions of the evidence shew that it took place in August. The defendant admitted having a conversation with Mr. Goodall, but denied using the language attributed to him.

Another witness called by the plaintiff testified that the defendant stated to him "that he would not do Rutledge any good."

It will be observed that the alleged slanderous words testified to by the witnesses are not exactly the words charged in the statement of claim. This, however, is not necessary. In

Reilander v. Bengert, 7 W. L. R. 891, the learned Chief Justice, in giving the judgment of the Court en banc, said: "It is not necessary to prove all the words alleged; enough has been proved to establish that an offence of the character alleged in the statement of claim was imputed by the words." Here the offence imputed to the plaintiff was that he drugged the horses he had for sale, and the evidence satisfies me that the defendant on the occasion testified to by Elizabeth Goodall did impute this offence to the plaintiff, and imputed it in practically the language of the statement of claim.

The words used affect the plaintiff in his trade or business, and are, therefore, actionable without proof of special damage being sustained thereby.

On the second count, as the witness John Goodall was evidently mistaken as to the time when the conversation took place, I hold that this charge has not been proven.

There will be judgment for the plaintiff on the first count charged in the statement of claim. I fix the damages at $100. The plaintiff will have his costs of the action.

THE

Western Law Reporter

VOL. VIII. TORONTO, OCTOBER 1, 1908. No. 12

SASKATCHEWAN.

LAMONT, J. AUGUST 5TH, 1908.

TRIAL.

O'NEIL v. DRINKLE.

Vendor and Purchaser—Contract for Sale of Land—Failure of Vendors to Procure Title—Statute of Frauds—Memorandum in Writing—Purchaser's Damages for Loss of Bargain—Measure of Damages.

Action for specific performance of a contract for the sale of land by the defendants to the plaintiff, or for damages.

J. D. Ferguson, Saskatoon, for plaintiff.

H. W. Brown, Saskatoon, for defendants.

LAMONT, J.:—Some time prior to 10th August, 1905, the plaintiff called at the office of the defendants, who were land agents in Saskatoon, and asked if they could sell him the south-west quarter of section 5, township 34, range 9, west of the third meridian, which contained 120 acres, and at what price. The defendants quoted him $7 per acre. The plaintiff thought the price too high. On thinking the matter over, however, he concluded he wanted the land, and on 10th August he again went to the defendants' office and interviewed Mr. J. C. Drinkle, the defendants' manager, in reference to the land. Mr. Drinkle told him the price was now $7.25 per acre. The plaintiff agreed to purchase at that price, and signed the following application form:—

"Saskatoon, August 10th, 1905.

"To J. C. Drinkle & Co., Saskatoon, Sask.

"Gentlemen,—I hereby offer to purchase, subject to the usual conditions of the company, the following lands of the Canadian Northern Railway Company, east half of s.-w. and n.-w. ¼ of s.-w. of section 15, township 34, range 9, west 3 meridian, containing 120 acres, at $7.25 per acre, and survey fee of 10 cents per acre, and enclose herewith first instalment of the purchase money, $240. I agree to pay the balance of the purchase money in 4 equal annual consecutive instalments, with interest at 6 per cent. per annum, the first of said instalments to be paid in one year from October, 1905, and to pay interest at 6 per cent., payable annually on all payments in arrears, and to execute the usual contracts of the company.

"If, prior to the receipt of this remittance, the land has been purchased by another person, please return the amount to me. If for any other reason this offer cannot be accepted, please advise me of the fact and return the amount or hold it to my credit pending my further instructions.

"Yours truly,

"Michael O'Neill,
"Farmer,
"Loganton, Sask."

"Remittance.
"Bank draft or accepted cheque, $240.
"J. C. Drinkle, solicitor."

At the same time he gave his cheque for $240, the first instalment of the purchase money. About a week afterwards he received from the defendant the following letter:—

"Saskatoon, N.W.T., August 14th, 1905.

"Michael O'Neill, Esq.,
Loganton, Sask.

"Dear Sir,—We herewith enclose contracts in duplicate. No. 00175A and B for the e. ½ of the s.-w. ¼ of and the n.-w. ¼ of the s.-s. ¼ of 15 in 34-9-3. Kindly sign your name in full, having signature witnessed, and return all copies to us.

"Yours very truly,
"J. C. Drinkle & Co.,
"Per J. C. Drinkle."

Encl.

Enclosed in the letter were two contracts in writing between the plaintiff and the defendants, by which the defend-

ants agreed to sell to the plaintiff the said lands, and reciting that the purchaser had paid in respect of the said lands covered by the two contracts the sum of $240. It was a term of the said contracts that the purchaser on paying the balance of the purchase money on the dates set out in the contract would be entitled to a conveyance of the land. The contracts when sent to the plaintiff by the defendants had the signature of the defendants printed at the bottom of the documents. The plaintiff, on receipt of the defendants' letter, signed the contracts and returned them to the defendants. Subsequently he called at the defendants' office for his copy, but the defendants' manager, J. C. Drinkle, was absent, and he did not get it. He, however, believed the land to be his until 20th February, 1906, when he received the following letter:—

"Saskatoon, Canada, February 20th, 1906.

"Mr. Michael O'Neill,
Loganton, Sask.

"Re n.-w. ¼ of s.-w. ¼ and e. ½ of s.-w. ¼ 15-34-9-3.

"Dear Sir,—The writer has just returned from Winnipeg, where I have been negotiating with the Saskatchewan Valley and Manitoba Land Co., Limited, with reference to the entire s. ½ of 15-34-9-3, and from which you offered to purchase 120 acres.

"I desire to state that the s. ½ of 15-34-9-3 was reported to me under date of June 14th, 1905, by the above named land company as available, and since that date and in fact until September 25th, 1905, I was under the impression that the said half section had been reserved for the writer as a part of my purchase from the said company. Under date of September 25th, 1905, I received the following telegram from the company:—

"'West half of south-east quarter section 15, north half of south-west quarter section 15, south-east quarter of south-west quarter section 15, all in township 34, range 9, west third, are not available. Contracts are being cancelled. Writing.'

"And since that date I have been, as hereinbefore stated, negotiating with the company, and endeavouring to secure this property for you.

"However, I beg to state that the company have shewn me their records, and I have learned that the s. ½ 15-34-9-3 was sold some time prior to June 14th, 1905, by the Sas-

katchewan Valley and Manitoba Land Co., Limited, to a party by the name of Thomas Richardson, of Carman, Manitoba; therefore I desire to tender you my cheque No. 1489 for the sum of $240, which is the total moneys you have paid me up to date on this property, as I will be unable to secure the land and deliver you title upon your paying in full for the same; and I desire to state that any agreement or understanding between us now becomes null and void, and I will in no way be liable for any damages in connection therewith, and request you, if you doubt the writer's word as to my honesty with this trade, that you communicate direct with the Saskatchewan Valley and Manitoba Land Co., Limited, from whom you will undoubtedly ascertain the information I am herein giving you. I request you to be good enough to return to the writer any receipts which you hold.

"Yours truly,

J. C. D.-G. "(Sgd.) J. C. Drinkle & Co.,
1 Enc. "Per G. P. Gibbons."
Registered."

The plaintiff refused to acquiesce in the cancellation of the contract, and brought this action for specific performance or damages.

The land in question at the time the agreement between the plaintiff and the defendants was entered into was, so far as the evidence shews, the property of one Thomas Richardson, of Carman, Manitoba, he having purchased it from the Saskatchewan Valley and Manitoba Land Co., Limited, in November, 1903, but at the date of the agreements the defendants honestly believed it was available for themselves, as they had on 14th June, 1905, received the following letter from the Saskatchewan Valley and Manitoba Land Co., Limited:

"Winnipeg, Man., June 14th, 1905.

"Messrs. J. C. Drinkle & Co.,
"Saskatoon, N.W.T.

"Gentlemen,—Replying to your favour of June 12th, will say that the south half of section 15-34-9 w. 3rd is available.

"Yours truly,

"The Saskatchewan Valley and Manitoba Land Co., Ltd.,
A. D. McR.G. A. B. McRae."

At that time the defendants had an arrangement with the Saskatchewan Valley and Manitoba Land Co., Ltd., who were the selling agents for the Canadian Northern Railway Company, by which the defendants could select and purchase from the railway company lands up to a certain amount at a certain price. As the defendants found purchasers for the land, they selected it and sold it to the purchasers, taking contracts from them in accordance with the terms agreed upon, and giving a contract to the railway company in accordance with the arrangement they had made with their agents, the Saskatchewan Valley Co. The reason for this, as explained by J. C. Drinkle, was that the railway company would not accept contracts directly from the purchasers and protect the defendants for the difference between what they were selling the land for and what they were paying for it. The defendants, therefore, had to buy the land direct themselves, and they could sell it on whatever terms they wished.

Relying on the letter of 14th June, the defendants sold the land to the plaintiff and forwarded their own contract to the Saskatchewan Valley Co., who sent it on to the National Trust Co., Limited, at Toronto, who were the commissioners for the Canadian Northern Railway Company, for their signatures. On 25th September, 1905, the defendants received from the Saskatchewan Valley and Manitoba Land Co., Ltd., the following letter:—

"Winnipeg, Man., September 25th, 1905.

"Messrs. J. C. Drinkle & Co.,

"Saskatoon, Sask.

"Dear Sirs,—We wired you this morning as follows:—

"'West half of south-east quarter section fifteen, north half of south-west quarter section fifteen, south-east quarter of south-west quarter section fifteen, and north-east quarter section thirty-one all in township thirty-four, range nine, west third, are not available. Contracts are being cancelled. Writing.'

"And this is to confirm the same.

"We desire to state that we forwarded the contracts to the National Trust Company, Limited, for their signature as Commissioners of the railway company, and they returned the same, stating that the land was not available for the Canadian Northern Railway; therefore we were compelled to cancel the reservation.

"Will you be kind enough to select other lands in lieu of these, and favour us with a list of the lands, as we desire to have the new contracts issued and forwarded to you for signature.

"Yours very truly,

"The Saskatchewan Valley and Manitoba Land Co., Limited.

"By J. A. McRae,

JAMCR/D. "Secretary."

On receiving this letter, the defendants entered into correspondence with the Saskatchewan Valley Co., and later with the National Trust Co., with a view of getting them to secure the land for the defendants, and, so far as these companies are concerned, the defendants acted in good faith and made every effort to secure the land. They, however, did not approach the owner, Mr. Richardson, at all, nor did they attempt to get the land from him. The following passage from the evidence of J. C. Drinkle states the position taken by the defendants:—

"Q. Did you try to get it from Richardson? A. No.

"Q. You say that you insisted on the company producing the land to you or getting it for you, that you wished to sell it to Mr. O'Neil, that you acted in good faith, but that you didn't go to Mr. Richardson to try yourself to get it? A. No, I was dealing with the Saskwatchewan Valley Land Co.

"Q. You didn't go to Richardson and try to buy it? A. No."

Although the defendants were notified on 25th September, 1905, that the land was not available, they did not notify the plaintiff of the fact until their letter of 20th February, 1906.

On these facts the plaintiff asks for specific performance or damages for loss of his bargain.

The defendants contended:—

(1) That they did not make the alleged contracts, or, if they did, that the contracts are not sufficient to satisfy the Statute of Frauds.

(2) That the plaintiff made application through the defendants for certain lands of the Canadian Northern Railway Company, and that the defendants acted in good faith and made every reasonable effort to procure the said lands for the plaintiff, but were unable to do so, and the agreement was not carried out owing to the inability of the defendants

to make title, and therefore the plaintiff was not entitled to damages for loss of his bargain, but only to a return of his payment, which the defendants had previously tendered to him and have now brought into Court.

No reply was filed to this defence.

As to the first contention; I am of opinion that the defendants' letter of 14th August, and the contracts therein enclosed, form not only a complete contract between the plaintiff and the defendants, but also a sufficient memorandum in writing to satisfy the Statute of Frauds.

As to the second contention; counsel for the defendants argued that where a vendor sold land in good faith, but was unable to make title, the purchaser was only entitled to a return of his money and his costs of investigating the title, and cited as authority the case of Moody v. McDonald, 4 Man. L. R. 303, and the cases therein referred to of Flureau v. Thornhill, 2 W. Bl. 1078, and Bain v. Fothergill, L. R. 7 H. L. 158.

The two latter cases, without doubt, lay down the rule that upon a contract for the sale of real estate when the vendor without his default is unable to make a good title, the purchaser is by law not entitled to recover damages for the loss of his bargain. The rule thus laid down creates an exception to the common law rule "that when a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed."

Although the rule laid down in Flureau v. Thornhill and Bain v. Fothergill qualifies the common law rule as to damages, it is undoubtedly the law of England, and, that being so, two questions present themselves for consideration:—

(1) Does the exception to the general rule as laid down in Flureau v. Thornhill apply in this province?

(2) If so, do the facts of this case bring it within that exception?

The reason for the adoption of this exception has been variously stated. In Lock v. Turz, L. R. 1 C.P. 453, Blackburn, J., says: "The reason, no doubt, is this, that from the complicated nature of our law of real property, no man can be certain that he has a perfect title to his estate, and therefore it is a prudent thing to make it part of every bargain for the sale of real property that if the vendor fails to make a good title according to the conditions, he shall not be liable to

reimburse the intended purchaser the full measure of damages which would be awarded to him in an ordinary case, but the bargain should be off and the purchaser take back the amount of his deposit, together with interest, and his costs of investigating the title."

In Bain v. Fothergill Lord Hatherley said: "The foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

In this province, however, the reasons for the adoption of this exception to the common law rule as to damages do not exist. Instead of the complicated law as to the title of real estate which they have in England, we have a very simple system of land transfer, under which a person having a certificate of title holds an indefeasible title to his land, which is not subject to those uncertainties and defects which led to the establishment of the exception as laid down in Flureau v. Thornhill, and as was said by Cockburn, C.J., in Engel v. Fitch, L. R. 3 Q. B. 314: "The limit of the exception is to be found in the reason on which it is based; the reason ceasing, the rule should also cease."

Therefore, I am of opinion that the conditions being entirely different here, and the reasons which led to the establishment of the exception being entirely absent, there is no reason why a different principle should be adopted in assessing damages for breach of contract for the sale of land than that adopted for the breach of other contracts.

In the view which I take of the facts of this case, however, it is not necessary to pronounce upon this point, as, even if the exception as laid down in Flureau v. Thornhill is held to prevail here, the facts of this case take it outside that principle. To come within that principle the vendor must without any default of his own be unable to make title. In Engel v. Fitch, above referred to, the defendants, who were

the mortgagees of the lease of a house, sold it to the plaintiff and agreed to give possession on a certain day; the plaintiff re-sold it at an advance in price. The title was satisfactory, but the mortgagor was in possession and refused to vacate. The defendants could have compelled him to vacate, but refused to do so on the ground of expense. It was held that the plaintiff was entitled to damages for loss of his bargain, on the ground that the vendors had failed to do their best to carry out their contract.

In Day v. Singleton, [1899] 2 Ch. 322, a vendor agreed with a purchaser to sell a leasehold hotel subject to the consent of the lessor being obtained to the sale. The vendor died, and his personal representative not only did not obtain the lessor's consent, but actually induced him to refuse that consent, which the lessor accordingly did, and the purchaser thus lost his bargain. In an action by the purchaser it was held that the plaintiff was entitled not only to a return of his deposit and interest and costs of investigating the title, but also to damages for loss of his bargain by reason of the vendor's omission to do his best to procure the lessor's consent. In that case Lindley, M.R., said: "It was Singleton's business as Dunn's (the vendor's) representative to obtain that consent if he could. . . . Singleton never asked the lessors to accept Day as their tenant without a bar, and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused."

The facts of the present case bring it within the principle laid down in Day v. Singleton. The defendants contracted to sell the land in question to O'Neill. They did not have a title. In that case it was their duty to do their best to obtain title for him. The only way they could make title was through the owner, Mr. Richardson; but they never approached Richardson in any way to obtain title from him. The onus was upon them to shew that they could not make title through Richardson, but, instead of displacing that onus, they admit they never even tried to get a title from him. Under these circumstances, I am of opinion that it cannot be said that they did their best to procure a title for the plaintiff, and he is entitled to damages for the loss of his bargain.

The measure of damages should be the difference between the contract price and the value of the land at the time the contract was broken. This I find on the evidence to be $5 per acre.

There will therefore be judgment in favour of the plaintiff for the return of the $240 paid by him, and now in Court, with interest, and $600 damages for the loss of his bargain. The plaintiff will have his costs of the action.

SASKATCHEWAN.

LAMONT, J. AUGUST 5TH, 1908.

CHAMBERS.

SASKATCHEWAN LUMBER CO. v. MICHAUD.

Bill of Sale—Validity as against Execution Creditors of Bargainor — Consideration—Marriage Settlement—Past Indebtedness—Consideration not Truly Expressed—Bills of Sale Ordinance, sec. 11—Interpleader.

Appeal by plaintiffs (execution creditors) from order of local Master at Arcola in favour of Alexandrine Michaud, claimant, upon an interpleader application.

H. V. Bigelow, Regina, for the appellants.

William Trant, Regina, for the claimant.

LAMONT, J.:—This is an appeal from the decision of the local Master at Arcola. The plaintiffs on 8th January last recovered judgment against the defendant for $657.81, and issued execution. Under the execution the sheriff on 20th January, 1908, seized a quantity of personal property which was then in the defendant's possession, including a number of horses, a waggon, sleigh, buggy, and some harness. The day after the seizure the property seized was claimed by Alexandrine Michaud, wife of the defendant. The sheriff took interpleader proceedings, in which an issue was directed between the plaintiff and the claimant. Alexandrine Michaud claimed the goods by virtue of a bill of sale made to her by her husband, the above defendant, which bill of sale was dated 12th October, 1907, and was registered in the proper office on 15th October, 1907. The bill of sale purported to assign and transfer to Alexandrine Michaud the horses, waggon, buggy, sleigh, and harness seized. The con-

sideration expressed in the bill of sale was $1,000. No money was paid to the defendant by the claimant for the property so sold, but she asserted that by an indenture in writing (which was a marriage settlement) bearing date 3rd April, 1907, and made in the province of Quebec, where she then lived, the defendant, H. Michaud, promised to give her the sum of $3,000 in consideration of their marriage; that subsequently she married him, and the consideration of $1,000 mentioned in the bill of sale was not a present payment by her of that amount to the defendant, but a settlement of his liability under the marriage contract to the extent of $1,000.

The marriage contract, which seems to be in proper form and duly registered according to the laws of Quebec, sets out that in consideration of the future marriage the future husband makes a donatio inter vivos to his future wife of $3,000, the said sum to belong to the future wife in her own right, but with the droit de retoir in favour of the future husband; and to secure the said sum hereinbefore given the said husband charges the property, movable and immovable, which he owns or which he shall own in future. At the time of the marriage the only property owned by the defendant was in Saskatchewan, and consisted, among other things, of the goods seized.

The local Master held that the above contract constituted an actual debt and a sufficiently good consideration to support the bill of sale, and, as the consideration of $1,000 expressed in the bill of sale was to be credited on this indebtedness, there was valuable consideration equivalent to a cash payment, and, that being so, the consideration for the bill of sale was truly expressed within the intent of sec. 11 of the Bills of Sale Ordinance, and he gave judgment in favour of the claimant. From his judgment the plaintiffs appealed.

The claimant, Alexandrine Michaud, claims the property seized by virtue of the bill of sale given to her by her husband.

On the argument a number of grounds of appeal were urged, of which I need notice but one; (4) that the bill of sale is null and void as against the plaintiffs, because the consideration for which the same was made is not truly expressed therein.

I agree with the local Master that the liability incurred by H. Michaud under the marriage contract is a sufficiently

good consideration to support the bill of sale, but I am compelled to differ from him in holding that the bill of sale truly expresses the consideration for which the same is made. Section 11 of the Bills of Sale Ordinance reads as follows: "11. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, or in case the consideration for which the same is made is not truly expressed therein, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration."

In Mueller v. Cameron, 2 W. L. R. 524, the learned Chief Justice of this Court used the following language: "The consideration for the bill of sale, as expressed therein, is 'the sum of $1,907.45 of lawful money of Canada paid by the bargainee to the said bargainor at or before the sealing and delivery of these presents.' As already stated, the consideration was an alleged past indebtedness due from Mueller to the claimant. I am inclined to think, although I do not express a decided opinion on the subject, that the bill of sale is void under sec. 11 of the Bills of Sales Ordinance, because the consideration is not truly expressed; the express consideration is for a present payment, the true consideration was a past indebtedness."

And in Hennenfest v. Malchose, 3 W. L. R. 171, the same learned Judge said: "It was admitted that it (the bill of sale in that case) was based on no other consideration than the sale of 5th May, 1904. I hold this bill of sale to be null and void under sec. 11 of the Bills of Sales Ordinance, because the consideration for which the same was made is not truly expressed therein. The express consideration is a present payment; the real consideration, if any, which I very much doubt, was a payment of cash of $600 on 5th May, 1904, and a past indebtedness due Hubert Malchose, which had accrued prior to 5th May."

In the present case the express consideration is a present payment of $1,000. It is admitted by the claimant that the true consideration was a past indebtedness created under the marriage contract. It cannot, therefore, in my opinion, be said that the consideration for which the bill of sale was made is truly expressed therein, as required by sec. 11. I therefore hold the bill of sale to be null and void.

The appeal will be allowed. There will be judgment for the plaintiffs. The claim of Alexandrine Michaud will be barred, and she will pay the plaintiffs' costs of the interpleader proceedings and of this appeal.

SASKATCHEWAN.

LAMONT, J. AUGUST 7TH, 1908.

TRIAL.

TAYLOR v. POIRIER.

Sale of Goods—Warranty—Representation of Soundness of Animal Sold—Request for and Refusal of "Guarantee"—Evidence—Reliance on Representation.

Action for damages for breach of a warranty.

T. D. Smith, for plaintiffs.

R. W. Shannon, for defendant.

LAMONT, J.:—On 6th March, 1905, the plaintiffs purchased a bay mare from the defendant for $175. The plaintiffs allege that at the time of the sale the defendant represented to them that the mare was sound and all right in every way, and that, relying on the said representations, they purchased the said mare. The mare having died about 4 weeks afterwards from heart disease, the plaintiffs have brought this action and claim damages for breach of warranty. The defendant denies that he made any representations as to the soundness of the animal at the time of the sale.

I find on the evidence that in the forenoon of 6th March, 1905, the plaintiff W. S. Taylor went to the defendant's barn with one McLean to see a mare which McLean informed him defendant had there for sale; that there he saw defendant Poirier and asked him if the mare was all right. Poirier replied, "Yes, the mare's all right." The plaintiff then asked him if he would guarantee the mare, and Poirier answered that he would not. McLean, who was present, said, "It's against his principles in business to give a guarantee." The plaintiff W. S. Taylor went home and returned in the after-

noon with his father, the plaintiff James H. Taylor, and again looked at the mare. James H. Taylor asked Poirier if the mare was sound. Poirier said, "Yes, she's all right." W. S. Taylor then said to Poirier, "Will you guarantee the mare?" Poirier said, "No, I never give a guarantee with my horses." The plaintiffs took the mare, and gave their note for $175, which they subsequently paid. The mare died from heart disease a few weeks after the sale. On these facts the plaintiffs ask for a return of the purchase money. The defendant at the time of the sale did not know that the mare was diseased.

The rule of interpretation as applied to express warranties does not differ from that of other contracts. I find in Benjamin on Sale, 5th ed., at p. 660, the following: "In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect." As to what constitutes a warranty, the rule of law is that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended: Sm. L. C., 10th ed., vol. 2, p. 53. Not only must it have been intended as a warranty by the vendor, but it must have been relied on by the purchaser; it must, in fact, have constituted an agreement with reference to the mare: Sales of Goods Act, sec. 2 (o). Here the representation made was in effect, "The mare is all right, but I will not guarantee that she is." Was that intended by Poirier to be an undertaking that the mare was sound? The expression used by him that "the mare is all right" is sufficient to create a warranty, and if it had stood alone the inference would have been irresistible that he intended it as a warranty. But it does not stand alone. As part of the conversation he is asked if he will guarantee the mare, and he says he will not. His refusal to guarantee her shews that it was not his intention to bind himself in that way. Again, can it be said that the plaintiffs relied on his representation that the mare was all right? I do not think so. The fact that they asked Poirier if he would guarantee her, after he had said she was all right, leads me to the conclusion that they were not relying on his statement and wished to bind him by a guarantee, which he refused to give. The words used by the defendant that the mare was all right, taken in connection with the refusal to give a guarantee, must, in my opinion, be held to mean no

more than if he had said: "I will not guarantee the mare, but to the best of my knowledge she is all right." To succeed, therefore, the plaintiffs must, in my opinion, shew that at the time of the sale the defendant knew the mare was unsound. This they have not done.

There will be judgment for the defendant with costs.

SASKATCHEWAN.

LAMONT, J. AUGUST 7TH, 1908.

TRIAL.

MASON AND RISCH PIANO CO. v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods — Injury to Goods Carried — Negligence—Condition Limiting Liability—Approval of Board of Railway Commissioners.

Action for damages for injury to a piano carried by the defendants for the plaintiffs from Regina to Saskatoon.

J. F. L. Embury, for plaintiffs.

J. A. Allan, for defendants.

LAMONT, J.:—On or about 11th September, 1905, the plaintiffs' agent at Regina, Norman Edgar, boxed up two pianos and shipped them to Saskatoon to his own order. The pianos were sent from the plaintiffs' warehouse in Regina to the defendants' shed on a dray, and were there placed in the defendants' car for shipment. The pianos were carried by the defendants to Saskatoon, where, on 11th September, 1905, Edgar signed a receipt for them to the defendant company, in which receipt the pianos were described as being in good order. Edgar, after signing the receipt, unloaded one of the pianos from the car, but, having no warehouse or place of business in Saskatoon, made arrangements with the defendants' freight agent to have the other piano placed in the defendants' freight shed. About a month afterwards, having made a sale of the piano to one Tofft, Edgar had the piano placed on a dray and told the driver to take it to Mr. Tofft's house. When the piano arrived at Tofft's house, and the box was taken off the dray, it was discovered that the piano had been damaged; the action was jambed and some of the posts split and broken.

Edgar testified that from the character of the damage done he believed it was caused by the piano falling on its back or end. No evidence was given as to how or when the damage was done to the piano; no evidence was given that it did not fall while in the possession of the drayman in being taken from the plaintiffs' warehouse to the defendants' freight shed in Regina, or from the defendants' freight shed to Tofft's house in Saskatoon. The only evidence given was by the freight clerk at Saskatoon, who testified that the damage was not done either in unloading the piano from the car, or while in the defendants' freight shed at Saskatoon.

On behalf of the defendants it was contended: (1) that there was no evidence to shew that the piano was damaged while in the defendants' possession, or that the defendants had in any way been guilty of negligence; and (2) that the piano was carried by the defendants under the terms of a special contract which provided that the defendants should not be liable for or in respect of the loss or damage to (among other articles) musical instruments carried by them, and, if such property was accepted or carried, it was entirely at the risk of the owner, without liability direct or indirect on the part of the company.

As to the first of the above contentions, the plaintiffs did not establish that the piano was damaged while in the possession of the defendants, and it seems to me that there is just as strong a presumption that it was damaged while in the possession of the drayman as while in the possession of the defendants. The plaintiffs' agent, Edgar, could not say that he was present at the loading or unloading of the piano in Regina, or that he went with the drayman to the freight shed. I cannot, therefore, presume that the damage was caused by the defendants. As to the second point, the contract purports to limit the liability of the defendants as common carriers. Section 340 of the Railway Act reads as follows: "No contract, condition, by-law, regulation, declaration, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration, or notice, shall have been first authorized or approved by order or regulation of the Board." The Board referred to is the Board of Railway Commissioners.

On 17th October, 1904, the Board made an interim order authorizing the use by the defendants of the form of the shipping contract which they used in this case, and which contained the clause above referred to. The plaintiffs are, therefore, bound by the terms of the contract. The construction of this contract was considered in Booth v. Canadian Pacific R. W. Co., 2 Can. Ry. Cas. 389, and in Costello v. Grand Trunk R. W. Co., 7 O. W. R. 846; and it was there held that the conditions of the contract absolved the railway company from liability for damage to goods of the classes set out in the clause, unless it was shewn in evidence that the company or its servants had been guilty of negligence

As no negligence was shewn in this case, the plaintiffs cannot recover. There will be judgment for the defendants with costs.

SASKATCHEWAN.

LAMONT, J. AUGUST 18TH, 1908.

TRIAL.

WATT v. WATT.

Master and Servant—Wages—Contract—Proof—Credibility of Witnesses.

Action for balance of wages for services.

W. B. Scott, Regina, for plaintiff.

H. V. Bigelow, Regina, for defendant.

LAMONT, J.:—The defendant admits the services, but says that no rate of wages was ever agreed upon, and that the services were not worth the amount claimed by the plaintiff, namely, $50 per month and board, from 1st April, 1905, to 1st June, 1907, and $75 per month without board from 1st June, 1907, to 5th September, of the same year. In March, 1905, the defendant, who is a brother of the plaintiff, telegraphed the plaintiff to come to Regina. The plaintiff came and began working for the defendant, who keeps a wholesale liquor store, on 1st April, 1905, and continued in his employ until 5th September, 1907. Both parties admit that when the plaintiff began to work for the defendant nothing was said as to the rate of wages the plaintiff was

to receive. The plaintiff was boarding with the defendant or at his expense until 1st June, 1907. The plaintiff, however, swears positively that in September, 1905, he had a conversation with the defendant about his wages. He says that in that month the defendant was building, and was in need of money, and said so in the plaintiff's presence, that thereupon he (the plaintiff) said he had a little money in the bank and could let him have $100, that the defendant accepted the loan and asked him during the conversation how much he expected for wages, to which he replied that he expected $50 per month. He further says that the defendant did not express either assent or dissent, but that he (the plaintiff) understood he was to get the $50 per month exclusive of board. The defendant admits the loan of $100, but denies that the conversation in reference to the wages ever took place. After the plaintiff left the defendant's employ, when they came to settle their accounts, the defendant offered the plaintiff $40 per month, exclusive of board, from 1st April, 1905, to 1st June, 1907, and $75 per month after 1st June. The plaintiff refused to accept, and brought this action. If the conversation above referred to took place, I am of opinion that the plaintiff is entitled to $50 per month to 1st June, 1907.

In Lefeunteum v. Beaudoin, 28 S. C. R. 89, Taschereau, J., said that it was "a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed." And he cited the language of Baron Parke in Chowdry Deby Perod v. Chowry Damlot Sing, 3 Moo. Ind. App. 347, where he said: "In estimating the value of the evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time." And in Lane v. Jackson, 20 Beav. 535, the Master of the Rolls said: "I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstances. By this means I give full credit to both parties."

In the case under consideration, so far as I know, the parties are equally credible. Following the rule laid down in the above cited authorities, I find that the conversation took place as testified by the plaintiff, and that, the defendant having retained the plaintiff in his employ afterwards, the plaintiff is entitled to wages at the rate of $50 per month exclusive of board.

The plaintiff is, therefore, entitled to be paid $50 per month from 1st April, 1905, to 1st June, 1907, and, as the defendant agreed to allow him $75 per month after 1st June, on the settlement, I find that amount is what the plaintiff is entitled to.

In his statement of claim the plaintiff credited the defendant with the sum of $1,210. In addition to that amount, I find the defendant should be credited with $25 paid 24th February, 1907, and $50 paid 30th March, 1907, and also $15 for feed of plaintiff's horse, and $15 paid to Charles Walsh for plaintiff, or a total credit of $1,315. The claim for wages amounts to $1,533.33, leaving a balance in the plaintiff's favour of $228.33. The defendant paid into Court $35. This will be paid out to the plaintiff, and there will be judgment for the plaintiff for the balance, $193.33, and costs.

YUKON TERRITORY.

CRAIG, J. JULY 21ST, 1908.

TRIAL.

McDOUGALL v. JOHANSEN.

Mines and Minerals—Mineral Claims—Staking—Illegal Post—Grant to Locator under Age—Extension of Boundaries—Placer Mining Act, 1906, sec. 13—Grant by Gold Commissioner—Amendment—Note or Memorandum by Assistant Gold Commissioner—Status of Person Attacking Placer Grant—Parties—Attorney-General—Jurisdiction of Territorial Court—Adverse Right—Dominion Lands Act—Title—Purchaser for Value without Notice — Relocation.

The plaintiff sued, as a miner, the defendant, another miner, for unlawfully entering and mining on a portion of

the plaintiff's claim described in the pleadings as No. 254-A below discovery on Dominion Creek, under grant No. 90,824, claiming the appointment of a receiver, injunction, damages, and other relief.

Frank J. McDougal, for plaintiff.

George Black, for defendant.

CRAIG, J.:—The defendant denies that the plaintiff is the recorded owner of the claim in question under the grant named; denies that any such claim exists, and that the grant was ever issued for such a claim; and further denies that he is mining on the plaintiff's claim. The defendant then sets up that he is the owner of a placer mining claim recorded and described as A. Johansen bench claim, being on the right limit of 254 and 255 below lower discovery on Dominion Creek, staked and recorded by him, and also the owner of placer mining claims adjoining the said Johansen bench, described as the Sturtevant, Hood, F. W. Cramer, Bryant, C. H. Cramer, and portions of the E. Robertson bench claim, the same being included in the said Johansen claim by extension of boundaries. The defendant further sets up that the plaintiff on 15th December, 1906, applied for a grant or location of claim No. 256 by one Henry Stanley Avison under a staking of 9th December of that year; that Avison was the agent of the plaintiff in staking; and that the plaintiff acquired title by a bill of sale. The defendant further alleges that Avison was not, at the time he staked and obtained the grant and gave the bill of sale, a person entitled to stake and enter for or locate upon any lands in the Yukon Territory, and that the plaintiff has no status. The defendant counterclaims, asserting his own right under the extension of boundaries, with a declaration that the location of Avison and the title derived therefrom are null and void, and asks for an order that the same be set aside. To this statement of defence the plaintiff joins issue, but raises no question of status on the part of the defendant to either resist the action or ask for the cancellation of the plaintiff's grant.

The real contest, as derived from the pleadings and evidence, is this: McDougal, the plaintiff, employed one Ryan to procure men to stake a certain number of claims which were then alleged to be vacant mining lands on lower Dominion. On 9th December one of these claims was staked by Avison, who at the time he staked was under the age of 18

years, as was sworn to by his mother, and was under the age of 18 years when he conveyed the claim to McDougal. Avison applied for the claim and obtained a grant on 18th January, 1907, of Creek number 256 below lower discovery, further described in the grant as re-location, upper and lower halves. Some time after 18th January—how long after does not clearly appear, but that it was after is certain—the defendant applied for extension of boundaries under sec. 13 of the Placer Mining Act of 1906, which provides that "the boundaries of any claim for which a grant has been issued prior to the passing of this Act, may by order of the Gold Commissioner, upon application being made by the owner thereof, be enlarged to the size of a claim allowed by this Act, provided that such enlargement will not interfere with any mining claim or property owned by any other person." A plan is put in upon the trial, and it is admitted that the properties in question and described heretofore are the properties in dispute between the parties; that is, that if the staking of Avison was a good staking, and he did really make the staking which he alleges he made, that staking would cover the properties which the defendants afterwards applied to have included in his original claim, by virtue of sec. 13. On the application of the defendant for extension of boundaries a note to the following effect is made upon the application: "Enlargement of the A. Johansen bench granted so as to cover the Sturtevant, Hood, F. W. Cramer, Bryant, C. H. Cramer benches, and portions of E. Robertson bench, and any vacant ground adjoining the Johansen bench, so as to make a claim 500 by 1,000 feet in size, in so far as there is no confliction with the existing locations. F. X. Gosselin, Assistant Gold Commissioner." And to this application is attached a plan shewing the claims to be covered by the extension, and it is noted— "To be granted February 13th, 1907—G.P.," which is sworn to mean Gideon Pepin, one of the clerks in the Gold Commissioner's office; and further, a note below the note of Mr. Gosselin—"Benches herein described are all open for entry—G.P." Upon this application the defendant paid in the proper fee of $2, which fee is still retained by the government, or by the department here. Nothing seems to have been done in this matter, but the taking of possession by the defendant of part of the ground covered, that is, by going on and mining, until 16th November, 1907, when O. S. Finnie wrote the following letter to the defendant: "Sir,—Refer-

ring to the enlargement of boundaries of your bench opposite No. 255 below lower on Dominion Creek, which was granted to you on the 16th February last, I have to draw your attention to the fact that creek claim No. 254-A was staked by H. S. Avison on the 9th December, 1906. This claim would include all ground vacant at the time of staking which was included within 1,000 feet of the base line. It appears that the Robertson, Sturtevant, Hood, Bryant, F. W. Cramer, and C. H. Cramer benches were all vacant at the time; so that these claims would really be included in the creek claim. O. S. Finnie, for Gold Commissioner." Upon the same day we have a document as follows: "To whom it may concern. Take notice that on the 16th February last an enlargement of the boundaries of the A. Johansen bench opposite the right limit of No. 255 below lower discovery on Dominion Creek, was granted, to include the Robertson, Sturtevant, Hood, Bryant, F. W. Cramer, and C. H. Cramer benches; and take further notice that creek claim known and described as No. 254-A below lower discovery on Dominion Creek was staked on the 9th December, 1906, and that at the time the benches referred to were all vacant Dominion lands, so that the said boundaries would really be absorbed by the said creek claim No. 254-A. Dated at Dawson, Y.T., this 16th day of November, A.D. 1907. E. C. Senkler, Acting Gold Commissioner." Nothing appears to have been done by the defendant except that he took out a renewal of his claim—the Johansen bench—on 29th January, 1908.

In regard to the staking of Avison the following occurred. It appears from the evidence, according to the contention of the plaintiff, that Avison in applying for the claim wrongly described the ground as No. 256, instead of describing it as 254-A, No. 256 being very much lower down the creek than 254-A is alleged to be. Some time subsequent to the original grant, and certainly some time subsequent to the application of the defendant for boundary extension, the plaintiff by some means obtained an amendment, as he calls it, of his grant. This amendment is as follows, inserted after the description, "L. half 254 and U. half 255, known as No. 254-A,—G.P." or "G.B."—it is hard to say which, but "G.P." are probably the proper initials. Upon this amendment the plaintiff rests. How this amendment came about is not shewn in the evidence; what material was produced to the Gold Commissioner, or whoever made the amendment, is not

produced. The only document is the one which I have recited, directed to whom it may concern. That contains no adjudication authorizing amendment. It is simply a notice, whether true or not, that the enlargement applied for by the defendant could not take effect because the ground had been previously staked by Avison. It must be remembered that at this time Johansen's claim was on file. It had been approved by the Assistant Gold Commissioner, and in the document recited, signed by E. C. Senkler, Acting Gold Commissioner, it was declared that the enlargement was granted to the defendant. Under what authority the amendment was made I cannot determine, and I can determine no authority in law for any such proceeding as here appears. No fresh application is filed; no affidavit, as the law requires, by the locator, it put in shewing that this is the ground he staked. Apparently without any evidence but the statement of somebody, the original grant is entirely altered; instead of granting 256, it grants 254-A or intends to do so. Without judicial investigation, without notice to Johansen, this amendment is made that is now sought to be enforced. Next, the question arises: "What is the effect of the note upon the application of the defendant for extension of his boundaries. The law says that boundaries may be extended by order of the Gold Commissioner. That is a very explicit direction. There is no order of the Gold Commissioner produced. There is a note by the Assistant Gold Commissioner upon the application which says it is granted; but upon the same application there is a note—"To be granted February 13th." Now, which of these notes was made first does not appear, because the one signed by F. X. Gosselin bears no date, and certainly the note—"To be granted—G.P." is not a grant. Therefore I must take it that the note of F. X. Gosselin was made some time subsequent to the note—"To be granted February 13th—G.P." The whole is indorsed upon the paper signed by Johansen and dated 18th January. Then, again, what effect has the notice—"To whom it may concern"—upon this document, signed by Gosselin and Pepin, if it has any effect? It is not addressed to Johansen. There is no evidence that it ever came to his knowledge. It is directed broadly to the world, to whom it may concern. I can find no authority for any such order being made by the Gold Commissioner. If the grant to Johansen of the boundaries in extension was a good grant, then the acting Gold Commis-

sioner, upon the date when he signed that document, had no power to make any such order, because, upon the passing of the Placer Mining Act of 1906, and upon the subsequent consolidation of that in the Revised Statutes, all his powers which he originally had under the old orders in council, had disappeared. He had jurisdiction to hear and determine judicially all matters in difference in regard to entries for mining claims under the regulations, and to adjudge any patent, lease, or other instrument which purports by or on behalf of the Crown to grant or convey mining property, void on the ground that the same was issued in error or improvidence or the issue obtained by fraud. Such powers he no longer has, and I will consider later on whether this Court has such powers.

We have arrived at a very mixed condition of affairs. No one in authority, I take it, had any power to amend that grant in the manner in which it was amended. If it was issued in error, then the plaintiff or the locator should have taken steps under the Act to make a re-location or re-application, the only way provided for obtaining a placer mining property. Besides this question of law, there are questions of fact which arise in the case. It is alleged that to support the change in the grant or the amendment of it, the posts which were originally planted by Avison on what was really 256, were moved and carried up to what is now 254-A by one Angus Smith and one Hough, some time in the fall of 1907, up to which time the plaintiff had not been near his claim. I do not think I can find from the evidence that that is so. There is a great deal of conflicting evidence; but an independent witness, Stahl, swears that he was on the ground in February, 1907, and saw the stakes. There are other independent witnesses who swear they did not see the stakes, but that is very negative evidence in face of the sworn evidence of Ryan, who saw them planted, and of Stahl, who saw them shortly after on the ground, and of Hough, McDougal, and Angus Smith, who saw them in November, 1907. The others who give evidence give evidence of a very negative character, that is, that they didn't see those stakes there, that they went to look for stakes along this very base line, that they could not have missed them, that they were working on the adjoining claim within sight of the place when it was alleged the claim was staked, and saw no one there, and that they saw Smith carrying what appeared to be a stake in the direction of the

place where they say it was afterwards improperly planted. To find for the defendant upon these facts I would have to find deliberate fraud on the part of Mr. McDougal against the government, and I am not justified in doing that. It is further alleged that the posts were not legal posts, and upon the facts proven it is certainly clear that post No. 1 was not a legal post, being at the most 2½ inches flatted. Of this I am satisfied. It is further, of course, proved, beyond any doubt, that Avison when he staked was not of the full age of 18 years, as required by sec. 3 of the Act of 1906, in force at the time he staked, which provides: "Any person over but not under 18 years of age may enter, locate, prospect, and mine for gold and other minerals upon any land in the Yukon Territory." There is, therefore, the illegality in that the staker was under age, and that one of the posts—No. 1—was not a legal post.

It is contended that in any case Johansen has no status to attack the grant of McDougal from the Crown of this mining property. Although the question of status was not raised upon the pleadings, it was argued very fully at the trial, several authorities being cited to me; but I think the real point was probably missed upon the argument. Counsel for the plaintiff cited the cases of O'Brien v. Allen, 30 S. C. R. 341; Scott v. Henderson, Congdon's Digest N. S. Cases 601, Miller v. Lantz, 1 Thompson, and several American cases from Morrison's Mining Reports, which I think are not applicable to the state of the law in this Territory. This question has been several times considered in discussing mining cases in this Territory, and the law is by no means settled yet, my learned brother Dugas taking one ground and myself the other, while Mr. Justice Macaulay has not yet pronounced upon the clear legal issue, so far as I can gather from a perusal of his judgments. The question is, what is the status or what should be the status of a person attacking a placer grant, or should the Attorney-General be a necessary party to the action.

I considered this matter very fully in my judgment in Hartley v. Matson, which was afterwards carried to appeal before the Supreme Court of Canada, 32 S. C. R. 644. In that case the attack upon the hydraulic lease was made by pure volunteers, and, when considering the question of the status of the parties to attack that hydraulic lease, I held that the Attorney-General was not a necessary party. The

Supreme Court did not see fit to consider that question, but decided that the plaintiffs had no status, upon the argument before the Supreme Court it being admitted that they had no status except the right to stake as free miners if the lease were declared void. Davies, J., who gave the principal judgment, said: "I agree substantially with the judgment of the Gold Commissioner, Mr. Senkler. I do not think that the mere fact of the appellants as free miners entering upon lands already leased by the Crown and professing to locate claims there gives them any right or interest in the lands or any status to come into Court and ask for any declaration with respect to the validity of a prior lease from the Crown of these very lands. To obtain such a status mere staking is not sufficient; they must go further and obtain from the mining recorder their placer grants." From this dictum it would seem that two rival grants must exist at the same time to entitle the Court to consider the dispute, and to give jurisdiction. That was going much further than any case up to that time decided. The case of Farmer v. Livingstone, 8 S. C. R. 140, is a very full consideration of the whole question of status under the Dominion Lands Act. Referring to homestead entries there, the Court were not all of the same opinion. Chief Justice Ritchie said that "the bill of a person attacking a patent must shew that he had some legal or equitable status under the statute capable of being enforced in a Court of law of equity;" and he held that entry of some kind under the Dominion Lands Act was necessary to give status to such a person. He said further: "How can a party sustain an action, bill, or plaint respecting such lands unless he has a right or interest therein which a Court of law or equity can recognize. If a plaintiff brings a suit, whether at law or equity, and does not shew on the face of his declaration or bill a legal or equitable cause of action, he may be met at the outset by a demurrer, and I am at a loss to conceive of a practitioner bold enough to urge on the Court that, though he has no legal or equitable claim that a Court of law or equity could enforce, he has a moral claim which he chooses to designate a grievance or a prejudice, and, therefore, can maintain his action. I am, therefore, of opinion that to enable a party to take proceedings under this Act, he should have some legal or equitable status in connection with the lands, that is to say, some interest therein or right thereto enforceable at law or equity, and it is only for the protection

of such rights or interests that a party can invoke the aid of a Court of justice to repeal, under the statute, letters patent issued by the Crown in reference to Crown property." Strong, J., said, in speaking of the section which gives power to a Court of competent jurisdiction to cancel such documents, which I will cite later on: "It will be observed that this section says nothing as to the title required to authorize a party to institute an action under its provisions. It must, however, be assumed that no one but a person having a title or being interested in the subject of the grant is entitled to attack the patent, as it never could have been intended to enable a stranger to take such a proceeding. The statute merely gives a new remedy for the old common law right, and a third person proceeding under it to set aside a patent must, therefore, shew precisely the same title as was required to maintain a scire facias in the name of the subject, namely, that he had rights in the subject of the grant which have been prejudiced and affected by the patent." And in support of his judgment he cited from Maxwell on Statutes the following: "When the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable indeed, but it does not affect the validity of the act done in disregard of them, and it is no impediment to this construction that there is no remedy for non-compliance with the direction." Taschereau and Gwynne, JJ., were of a different opinion, and thought that sufficient was shewn upon the facts to give a status to attack the patent and have it declared void.

The section under which that case was decided is the same as the one in the regulations under R. S. C. ch. 55, sec. 205: "Wherever patents, leases, or other instruments respecting lands have issued through fraud or in error or improvidence, any Court having competent jurisdiction in cases respecting real property in the province where such lands are situate, may, upon action, bill, or plaint respecting such lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceedings as the said Court orders, decree or adjudge such patent, lease, or other instrument to be void, and upon the registry of such decree or adjudication in the office of the Registrar-General of Canada, such patent, lease, or other instrument shall be void." Two or

three questions arise under this section which I find it hard to determine. In the first place, the section relates to provinces, not to Territories. That may be a very mild objection. Then, again, it provides for the registration of the decree in the office of the Registrar-General of Canada. Further, it is a section under the Dominion Lands Act, affecting lands covered by the Dominion Lands Act. Now, in the law as it existed prior to the passing of the Placer Mining Act all regulations and ordinances affecting mining were made by orders in council or by ordinances under what is now sec. 159 of this Dominion Lands Act, old sec. 49. The Placer Mining Act having been enacted, does not that take the mining lands out of the provisions of the Dominion Lands Act? The jurisdiction which was given to the Gold Commissioner under the old ordinances affecting disputes regarding mining claims has been withdrawn. It is true that the jurisdiction to dispose of mining actions has in a sense been transferred to the Territorial Court, not directly but indirectly. There being no other jurisdiction in this Territory left to try such disputes, the only jurisdiction is that of the Territorial Court. But can it be said that after the enactment of the Placer Mining Act this sec. 205 of ch. 55 is the law affecting mining claims, and gives to this Court the jurisdiction to set aside any such grant or instrument? The whole spirit and purport of the Placer Mining Act would seem to lead to the conclusion that such jurisdiction is at least intended. The document which is called a grant, of course is not a patent under the great seal, but it is an instrument issued from the Gold Commissioner's office by a statutory officer under this Act. The Act declares who shall and who shall not be entitled to locate placer ground; it provides the mode in which that location shall be made; it makes staking the root of title and the first step in the chain of title; without that staking no title can arise under the Act, and without that staking being properly done no title can arise. An improper staking is as useless as no staking. The nature and size of the claims is provided; their directions; where they shall lie. Then it provides for the practice of locating and recording, and the locating and recording is simply acknowledgment, as I take it, by the proper officer of a staking proved to him to have been made in due form under the Act. Upon all these formalities being observed, that is, due location, the Act provides that the grant may be given for 1 or 5 years, provided that during

each year certain work shall be done and proved up in a certain way, and within a certain time, and these grants are renewable absolutely year by year upon the performance of these statutory regulations. The Act further provides that upon non-performance of yearly work required by the regulations by a located owner his claim shall become forfeited absolutely, and the claim forthwith open for re-location.

Section 30 provides that "no title shall be contested by any one who does not claim an adverse right except by leave of the Commissioner of the Yukon Territory. In the event of a claim reverting to the Crown as a consequence of such litigation, the plaintiff shall have the first right to locate said claim." This is a most unsatisfactory section and very hard to understand. It seems to me it can only mean that a pure volunteer in the nature of one informing the Crown requires the leave provided by the section; in other words, that a total stranger knowing of some defect in the title of a locator, may apply for and obtain leave from the Commissioner of the Territory to bring an action, and if upon that section he succeeds in establishing his allegations of improper title, then he has as a reward for his informing of the Crown the first right to the claim. Other provisions are contained in the Act with regard to the rights of co-owners and so on. Then under one division of the Act, 11, referring to disputes, it says: "In case of any dispute as to the locating of a claim, the title to the claim shall be recognized according to the priority of such locating, subject to any question as to the validity of the record itself, and subject further to the claimant having complied with all the terms and conditions of this Act." That section is also of doubtful meaning and hard to interpret. The Act provides for a board of arbitration which may determine any dispute between the owners of claims with respect to distribution of water, boundaries of claims, and dumping. It is provided by the Act that the grant shall be in the form provided for in schedule C, and the form of the grant provides in one of its clauses as follows: "All rights hereby granted are those laid down in the said Act and no more, and subject to all the provisions of the said Act, whether they are expressed herein or not."

From all these sections and provisions it would seem that it was intended that these disputes should be settled by some Court of competent jurisdiction, and that that Court should have the power to cancel or order the cancellation of a grant

which was void for non-compliance with the Act. But there is no express statutory right given in the Placer Mining Act, such as is contained in sec. 205 of the Dominion Lands Act.

The Dominion Lands Act and the status of persons suing under it was considered in London and Canadian Loan and Agency Co. v. Moffatt, 3 Man. L. R., where it was held that "an equitable defence in ejectment must do more than displace the plaintiff's legal title. It must shew that the defendant is himself, of right, entitled to some interest which gives him a right to attack the plaintiff's legal title. A plea attacked the patent under which the plaintiff claimed as having been obtained by fraud, but did not shew that if the patent were set aside the defendant would be entitled to possession." Killam, J., in giving judgment, said: "It appears to me that, in such an action, the defendant should shew more than a mere claim upon the bounty of the Crown—an equitable right or interest in the lands."

The matter was also considered in the case of Crotty v. Vrooman, 1 Man. L. R. 149. Taylor, J., who gave judgment, concluded that the Court had no jurisdiction to interfere in that case with the patent, no matter how wrongfully obtained, although the case was one of great hardship to the person seeking to attack it. The judgment, however, in that case went upon the consideration of the fact that the claims of the parties contesting had been fully considered by a land board and afterwards by the Minister, and passed upon, and, although the Minister had been incorrectly informed, and the board had acted improperly in taking evidence in the matter, yet that, in the absence of the Attorney-General, the Court had no power to give relief. See also the cases of The Queen v. Hughes, L. R. 1 P. C. 21; Kennedy v. Lawlor, 14 Gr. 226; Simpson v. Grant, 5 Gr. 267; Stevens v. Cook, Ross v. Attorney-General, 14 Gr. 467; Laurence v. Pomeroy, 9 Gr. 474; Mutchmore v. Davis, 14 Gr. 346; Martyn v. Kennedy, 4 Gr. 96.

In considering this question the Supreme Court seem to be very careful in their language in determining what would constitute proper status or give such legal or equitable rights as would entitle a person to attack a Crown patent. In the one case entry was required under the statute, and a mere claim to entry or a right to entry without the actual entry was not considered sufficient. Ritchie, C.J., in asking how a party could sustain such an action, speaks generally

of a legal or equitable right, but I can get no assistance from his judgment in determining what he would consider sufficient legal or equitable right. Strong, J., says that it must be assumed that it must be a person having a title or being interested in the subject of the grant, and that a mere stranger could not attack. Gwynne, J., and Taschereau, J., are much more specific in what they consider would give a proper status.

The Placer Mining Act, sec. 44 of ch. 64, R. S. C. 1906, provides that "no title shall be contested by any one who does not claim an adverse right except by leave of the Commissioner." The converse of this, I suppose, would be true, that any one having an adverse right may contest without the leave of the Commissioner. The question now arises, what is an adverse right? This has been considered in some British Columbia cases, and, in my view, an adverse right is a claim or right to contest the grant to any other person, which right arises by virtue of some act of the claimant done under the Act, and which contests a right of the adverse party under some professed act done under the Placer Act, both parties being in opposition and claiming their rights by virtue of the regulations. I am not quite clear that if such an adverse right exists before the issue of the grant, then that the adverse claimant has a status to sue, and this Court has jurisdiction to entertain the action. Whether or not this Court has such jurisdiction after the issue of such a grant, I will not just now consider. This Court has frequently maintained its jurisdiction by decisions even after the issue of a grant, and ordered to be cancelled grants for imperfect staking. There is no doubt that the Court has jurisdiction if the judgments of this Court are of any effect in directing the cancellation of grants for non-performance of work required by the regulations, because under that particular section both myself and Mr. Justice Macaulay have held that the Court has jurisdiction. Mr. Justice Dugas, on the contrary, has held the opposite, and his views are found very fully expressed in the case of Grant v. Treadgold, 4 W. L. R. 173, where my own views are fully set out in that case on the particular section in question. His views are also set out fully in the case of Risser v. Pinkiert, decided before the issue of the Western Law Reporter. It would seem singular if the Court had jurisdiction to declare the cancellation of a grant for the non-performance of work, where, perhaps,

the work might be one or two dollars short of the required amount, or where, perhaps, by a slight slip or mistake, one neglected to renew a claim, and had not jurisdiction to declare the cancellation of a grant obtained by absolute fraud or by one who had no right whatever under the regulations to obtain such a grant as in the present case, being under age. The discussion may perhaps seem useless, but it may not be useless because if it is the intention of the legislature to give such jurisdiction to this Court in placer mining matters, that intention, I think, should be expressed much more clearly than it is, and not be left to be drawn from inference from the general spirit of the legislation. But I am satisfied from the authorities that if a person attacking a grant has an adverse right or has some legal or equitable interest in the claim before the issue of the grant, then this Court has jurisdiction, and I decide not so much because I am convinced that sec. 205 of the Dominion Lands Act applies, or that any other statutory powers are given to the Court, but because of our general inherent jurisdiction under the common law, and because this Court has already held that it has jurisdiction to cancel other grants, and I think it advisable that this right should be maintained until some higher Court declares we have not that jurisdiction.

In the case which I am considering, on 18th January, when this plaintiff obtained his grant, it was clear that no adverse right existed in the defendant; but an adverse right did arise and a clear legal right arose before the amending of the grant. The grant which was given was for other property; it was not for the property in question and in dispute at all, and it was only upon the amending of the grant, long after the defendant's application went in, that the plaintiff acquired a right to the ground if he did acquire it at all by the amending grant. I am of opinion, first, that no right existed to amend that grant as it was amended; that the adjudication of whoever made the amendment, and of the acting Gold Commissioner declaring the defendant to have no rights was improperly made; that no such powers existed in either the acting or the assistant Gold Commissioner as they assumed to exercise in this matter; that if such powers are to be exercised they must be provided for by the statute, clearly and explicitly. Then, there being no existing grant at the time of the ground in question, when the defendant Johansen applied for it he had a right and has

a right to attack, and certainly a much stronger right to resist, in an action for ejectment, which this practically is, for, although it is brought in trespass, yet the defendant was in possession of the ground first, and the action is brought actually to establish the right to the ground and the title.

Holding as I do that the title of the plaintiff is defective, I have to consider what the title of the defendant is, and I think his title is also defective. There is no order, as the Act provides, giving him an extension of boundaries. All that he has is a note upon his application that the grant is made by the Assistant Gold Commissioner. The Act says the Gold Commissioner is the only one who can make such an order. Again, that is not a grant. There is no such grant provided for in the Act. The grant shall be an order of the Gold Commissioner. No order is produced. He only has existing to-day an application which may or may not be granted by the Crown according as the facts appear before them. They have, I presume, by the machinery provided there, by the officers appointed to inquire into the matter, adjudicated for the information of the Gold Commissioner that the grant should issue to the defendant for the extension of his boundaries, but such a grant has not yet issued. Again, the defendant renewed his bench without having included in it the extended boundaries, and his renewal he took out after he had received the latter from Finnie, which I have mentioned, apparently acquiescing in the decision at the time.

It is argued that the plaintiff is an innocent purchaser without notice. I do not think that this plea will avail him. He does not come under the rule governing innocent purchasers. More than that, the staking was done by his agent, because it is clearly proven—admitted in fact—that Ryan was hired by the plaintiff to procure men to do this staking for him; so that the staking was really his own act.

I cannot decree specific performance against the Crown. The Placer Mining Act gives this Court no power to direct the issue of a grant to any one. When the Gold Commissioner had jurisdiction to cancel grants, the whole matter was in his own hands, both in a judicial and administrative capacity. The only section which at all applies is sec. 30 of the Act, now sec. 44, R. S. C., which says that "in the event of a claim reverting to the Crown as a consequence of such

litigation the plaintiff shall have the first right to locate." If it was intended that this Court could order a grant, the Act would have said so and not left it to the successful party to re-locate.

The result of my judgment will be that neither party has any status in this matter, and, that being the case, under the authorities I must dismiss the action without costs, and for authority on this point see the cases of Clark v. Haney, Martin's Mining Cases 281, and Ryan v. McQuillan, in the same work, p. 239.

YUKON TERRITORY.

CRAIG, J. AUGUST 10TH, 1908.

CHAMBERS.

CLEVELAND v. ASAM.

Evidence—Foreign Commission—Examination of Plaintiff on his own Behalf—Bona Fides—Discretion.

Motion by the plaintiffs for a foreign commission to examine one of themselves, Frank A. Cleveland, who had removed to Dome City, Alaska.

C. W. C. Tabor, for plaintiffs.

J. P. Smith, for defendant.

CRAIG, J.:—The action is for an account for goods sold and delivered in 1900 and 1901, while the plaintiffs were resident in the Yukon Territory.

The defendant is still a resident of this Territory, and opposes the issue of the commission, on the ground that a full and fair examination can not be held in Alaska, although he produces no material to justify any such assertion.

I have read the affidavit of Mrs. Cleveland, the co-plaintiff of her husband Frank A. Cleveland, upon which she bases her motion, and in it she states that the debt was incurred while she was in partnership with her husband in a road house during the years mentioned, and that the defendant has admitted to her the liability.

The defendant has been examined for discovery, and I have read the entire examination, which is not very satisfactory. Some liability certainly exists, the amount of which the defendant will not admit. He admits receiving an account of the claim from the plaintiff Frank A. Cleveland for over $2,000, some time in 1900. He asserts that the account is outlawed, and certainly it would be but for a contra account which the plaintiffs set up to avoid the statute. This contra account is made up of a debt which the plaintiffs say they owed the defendant for the delivery of newspapers between January, 1902, and May, 1903, and which they say the defendant agreed to apply as part payment of this account. The defendant denies any such account and any such agreement. So far as I can judge from the evidence of the affidavit and the examination put in, the contest will revolve considerably around this counterclaim, and whether Asam agreed to apply it on the account so as to prevent the running of the statute. Of course, the defendant denies the account.

The plaintiffs' books were lost in a fire, and the evidenc sought to be obtained by commission will have to be general as to the contents of these books. Very many authorities were cited to me upon this question of the issue of a commission to examine the plaintiff on his own behalf. Frank A. Cleveland himself has not put in any affidavit, but his co-plaintiff, his wife, puts in one which is very full, she being here in the Territory now and having been examined de bene esse, on her own behalf.

It is urged strongly that the matter of the contra account being one within the knowledge of Frank A. Cleveland and the defendant, only, and it being a matter as to the veracity of these two witnesses, they should both be present in the box so that the Court may see their demeanour. It seems to me this is a very narrow issue upon which to ask that a witness be brought all the way from Alaska at an expense sworn to be over $400. I cannot see how a full and fair examination and cross-examination may not be had in Alaska. The issue is one which this Court should try. The plaintiffs shew a bona fide reason for the application. They left the Territory long before the writ was issued, and it is shewn by the examination of the defendant that he was at least on the verge of insolvency, if not insolvent, a short time after this account was incurred. The granting of a commission is a matter of discretion, and

that discretion should be based upon whether the Judge thinks that a full and fair examination may be held in the foreign country, with full opportunity to examine the parties. There is nothing before me on which I could find that such full and fair examination and cross-examination could not be held in Alaska. It is, no doubt, true that it is always better that the parties should be present in Court to give their evidence orally in the presence of the trial Judge; but, as has been laid down so often, the parties have a right to have their evidence taken in a foreign country if they are bona fide residing there at the time the evidence is required, and if they shew fair reason to the Court why the commission should be granted. I think they have in this case shewn that, and I would rely upon the reasons advanced in my own judgment of Carbonneau v. Letourneau, 3 W. L. R. 219; Starnes v. Kimmel, 1 W. L. R. 390; Ferguson v. Millican, 11 O. L. R. 35, 6 O. W. R. 661; Robins v. Empire Printing and Publishing Co., 14 P. R. 488, and the cases cited in these authorities, which I need not review again at length.

There will be an order that a commission issue to examine both Cleveland and the witness Bruning mentioned in the affidavit, upon payment of $50 into Court to cover the costs of the defendant in that commission; also reserving the right to the trial Judge to direct that Cleveland attend for examination, but not the witness Bruning, if it be found upon the return of the commission that a satisfactory examination has not been held.

The costs of this action will be costs in the cause, and the $50 paid to the defendant as costs on commission will be costs dependent on result of action.

YUKON TERRITORY.

DUGAS, J. AUGUST 11TH, 1908.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. MATHESON.

Evidence—Foreign Commission—Second Commission—Postponement of Trial—Terms—Costs.

Motion by plaintiffs for a foreign commission to examine a witness at Toronto, Ontario, on their behalf.

F. J. Stacpoole, for plaintiffs.

H. C. Bleecker and M. B. O'Dell, for defendant.

DUGAS, J.:—I have before me an application for a second commission to issue in order to examine a witness in Toronto. I understand that it is to prove the agreement by which the assets of the Bank of British Columbia were assigned to the plaintiffs, and, amongst others, the alleged indebtedness of the defendant. It is to cover an oversight that this application is made.

Although it is unusual to issue a second commission in the same case, and in England it is held that it should be done only on very special grounds, and there are no other special grounds here than oversight, still, considering that the defendant did not appear at the trial when it was begun and adjourned, and that the costs of bringing a witness from Toronto would be by hundreds of dollars larger than those to be incurred upon the execution of a commission, and that I have postponed the trial for the purpose of permitting the plaintiffs to adopt whatever proceedings might be authorized so as to put into the record the proof of such an agreement, and that I consider that it is in the interests of all parties concerned that this second commission should issue for that purpose, the application will be granted, but the plaintiffs will have to pay all the costs incurred, including those of this application as well as those of the execution of the old commission until it is returned into Court, and this in any event.

YUKON TERRITORY.

DUGAS, J. AUGUST 11TH, 1908.

TRIAL.

LUDWIG v. BEEDE.

Carrier—Contract for Carriage of Goods—Action for Damages for Breach by Failure to Deliver in Time—Lien for Freight—Evidence.

Action for damages for non-delivery of goods as stated in the judgment.

DUGAS, J.:—The plaintiff, having some provisions, in May and June, 1907, at the mouth of Clear Creek on the

Stewart, employed the defendant to freight the same to the discovery on the same creek. It is admitted that there were 905 pounds of the same, and that the rate of freight would be 10 cents, bringing the full amount to $90.50.

The plaintiff alleges that these goods were to be brought without delay to his place. The defendant says that when he made the undertaking the plaintiff knew that he was otherwise occupied, and that, besides, there was an understanding that he would do such freighting after some others.

The goods were brought to Barlow first, at about 12 miles from the Stewart, and from there to the discovery on Clear Creek. The plaintiff complains that this delay, which was of about one month, put him to some inconveniences, and alleges that he was forced on that account to come to Dawson to buy other provisions. In fact the defendant met him near discovery, when he (the plaintiff) told him that he was on his way to Dawson for provisions. At that time the defendant was bringing a load of plaintiff's goods to discovery.

The plaintiff did not buy any goods in Dawson, where he remained for a certain time, and returned afterwards to Clear Creek again. He now sues, alleging that he has suffered damages by the defendant wrongfully depriving him of the said goods and property, by refusing to give them up on demand, and that as a consequence he was compelled to make a trip from Clear Creek to Dawson and return in order to replace said goods, and for this he asks $500 damages.

The defendant says that he was not obliged to deliver the goods before the time that he brought them to discovery, and that he has a lien for the amount of his freight upon the same to the amount of $90.50. He counterclaims, and asks, besides, $25 for storage and $15 for boarding and lodging the plaintiff. I take these two items to be the result of an afterthought, and I do not think that the defendant is entitled to them; but, on the whole, I believe that the plaintiff has no case, as I consider that the weight of the evidence is entirely with the defendant; that he brought the goods within the time agreed upon, and that he was to be paid cash instead of being paid after certain delays. He, having the goods in his possession and a lien thereon, is not obliged to deliver them until his freight is paid.

I have, however, to deduct $6 from the $90.50 for some goods belonging to a third party, and forming part of the

bulk which he brought to discovery at the instance of the plaintiff.

The proper action by the plaintiff was not an action in damages under the circumstances, but purely and simply an action to recover the goods upon the freight being paid. Plaintiff's action is, therefore, dismissed with costs, and there will be judgment for $84.50 in favour of the defendant on the counterclaim with costs, upon delivery to him or his agent by the defendant of the said goods.

YUKON TERRITORY.

CRAIG, J. AUGUST 19TH, 1908.

CHAMBERS.

REX v. L'HEUREUX.

Criminal Law—Magistrate's Conviction—Evidence Returned on Certiorari Taken down by Stenographer not Sworn—Invalidity of Conviction—Jurisdiction—Seal.

Motion by the defendant to quash a summary conviction.

George Black, for defendant.

J. B. Pattullo, K.C., for plaintiff.

CRAIG, J.:—The defendant was convicted before R. Y. Douglas, a justice of the peace, for a breach of the Yukon Liquor Ordinance, in that, being the proprietor of a licensed premises known as "The Golden Flat," he admitted on said premises for the purpose of drinking a woman of loose, idle character, and allowed her to drink liquor on said premises.

Proceedings have been removed by certiorari before this Court, and the main objections are that the stenographer who took the notes of evidence was not sworn before taking such notes; that the information and conviction charge two distinct offences; and that the conviction as returned was not sealed.

Upon the return of the evidence the stenographer swears that he is the Territorial Court reporter; that he was appointed by the magistrate to report the evidence; that the

transcript of the evidence annexed is a true report of the evidence taken in the case before the said R. Y. Douglas. An affidavit is put in and read that the stenographer, as a matter of fact, was not sworn to take the evidence before the taking of it, and that affidavit is not answered; so that it must be taken to be proved as a fact that the stenographer was not in fact so sworn. The fine was paid upon the adjudication being made, and after the fine was paid a conviction was returned unsealed. Subsequently a sealed conviction was returned. The hearing was on 16th June, 1908; the conviction is made the same day, the original conviction being dated on the 13th June, which is, no doubt, a mistake.

Dealing with the objection as to the stenographer first, which objection is, I think, the only one which I will consider seriously, under the Act providing for procedure before a magistrate, it is provided by sub-sec. 7 of sec. 590 of the old Act, now sec. 683 of the present Code, R. S. C. ch. 146, that "every justice holding a preliminary inquiry shall cause the depositions to be written in a legible hand, and on one side only of each sheet of paper on which they are written, provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice, and who before acting shall make oath that he shall truly and faithfully report the evidence." The section, it will be observed, provides that the stenographer shall be sworn before acting. It is argued that this is simply a matter of procedure, and the strongest case to which I am referred is the case of Ex p. Doherty, 32 N.B.R. 479, where it was held that "sec. 590, sub-sec. 4, of the Criminal Code, 1892, requiring the depositions to be read over to the witness and signed by him and by the justice before the accused is called on for his defence, relates to procedure only, and non-compliance with it does not affect the justice's jurisdiction." It has been held that the swearing of the witness after his deposition is taken and not before is irregular and goes to the jurisdiction: Rex v. Kiddy, 4 Dowl. & Ry. 437, and Paley on Convictions, p. 127.

I have read the cases cited to me by counsel, which are voluminous, particularly the case of Re LeCroix, 12 Can. Crim. Cas. 297, where it was held that "in matters of summary conviction falling under the Criminal Code the depositions must be taken in writing; otherwise the conviction will be quashed; and this irregularity is not a mere matter of

defect of form and is not cured by section 1129 of the Code;" also the case of The King v. Janneau, 12 Can. Crim. Cas. 360; The King v. Macgregor, 10 Can. Crim. Cas. 313, to the same effect; also the case of Denneau v. Robidault, 8 Can. Crim. Cas. 501, also to the same effect; The Queen v. Hamilton, 2 Can. Crim. Cas. 390; Seager's Manual on this point; Re Stanbre, 1 Man. L. R. 325; and The King v. Trayner, 4 Can. Crim. Cas. 410.

I cannot agree with the reasoning in the case of Ex p. Doherty. It seems to me that if the provisions of the Code have no more force or effect than that judgment would seem to give to them, then legislation regulating the procedure of a justice of the peace would be practically inoperative. But I do not hold that this is matter of procedure only. It is matter of substance going to the jurisdiction. It is very hard to distinguish when an error of this nature affects the jurisdiction or affects only the procedure. Probably under the facts cited in Ex p. Doherty it is a matter of minor importance. But one can readily understand how in the case of a stenographer who is not sworn to take the evidence it may be a matter of very great substance. It is not stated, and it is not required to be stated, that in this case anything wrong occurred; but the principle is that the person who takes down the evidence must be acting under some safeguard. The magistrate is a sworn officer, and, even in his case, it has been doubted whether he may employ a clerk to take down the notes of evidence: see Paley on Convictions. But that is a very different matter, because when a clerk takes down the notes in longhand those notes are read over to the witness and signed by the witness, thereby acknowledging before the magistrate the correctness of the evidence. In the case of the stenographer no such safeguards are taken. He is not sworn to correctly report the evidence, and all that occurs in this case is that afterwards he swears that the notes which he returns are true notes of what he did take down. There is not even in this case the affidavit of the stenographer that he did correctly report. The evidence, not being taken as provided by law, is not evidence at all, and therefore there is no evidence taken that can be read. I think this is matter going to the jurisdiction. The taking down of the evidence, as has been said in some of the cases which I have cited, is a matter both for the protection of the magistrate and the protection of the public, and there can be no protection in the true

sense of the word either for the magistrate or for the public unless the reporter takes down the evidence under the solemnity of his oath. I, therefore, think that this is a matter which affects the jurisdiction, and is such an error as will be sufficient to quash the conviction.

I need not consider the other points raised, although they are also serious. In the matter of the seal it has been held in Bond v. Conmee, 16 A. R. 393, that "after the return to the certiorari a new conviction could not be returned, and that, as the conviction returned was not sealed, it was a nullity." Everything that could be done in this case was done before the formal conviction was drawn up; the fine was paid upon the adjudication, and the conviction which was first returned unsealed was merely the formal confirmation of the adjudication, and what the officer should have done. Nothing remained to be done; everything was done. Therefore, a second conviction might be held to be improperly returned, there being no power to make such a return of a sealed conviction. But I do not adjudicate upon that objection finally, and do not intend to be held to this expression of opinion, as I have not given the matter that full consideration which perhaps I might have given it, considering that the first objection is sufficient and fatal.

The conviction will therefore be quashed without costs.

YUKON TERRITORY.

CRAIG, J. AUGUST 26TH, 1908.

CHAMBERS.

DOODY v. BIGELOW.

Practice—Writ of Summons—Issue from Wrong Division—Irregularity—Appearance—Waiver—Rule 546—Transfer to Proper Division—Venue—Change of—Preponderance of Convenience and Expense—Postponement of Trial.

Motion by defendant Bigelow to change the venue from Dawson to White Horse.

J. B. Pattullo, K.C., for applicant.

George Black, for plaintiff.

CRAIG, J.:—In this case the defendants reside and the cause of action arose at White Horse, in the district which is set apart as a division of this judicial district of the Yukon, and a deputy clerk is there appointed and acting.

Under sec. 4 of ch. 17, being our Judicature Ordinance, it is provided as follows: "If there is a district of a deputy clerk established by Ordinance, suits in which the cause of action arose or the defendant resides in such deputy clerk's district shall be entered in the office of the deputy clerk, and suits in which the cause of action arose or the defendant resides in the remaining portion of the Territory shall be entered in the office of the clerk of the Court; and if in any suit the cause of action arose in the deputy clerk's district, and the defendant resides in the other portion of the Territory, or vice versa, the suit may be commenced in either the clerk's or the deputy clerk's office."

The writ in this case was issued in the clerk's office, the wrong place. The defendant Bigelow appeared, and the case is now set down for trial. The defendant Bigelow moves to have the place of trial of the action changed from Dawson to White Horse and for such further or other order as to costs and otherwise as to the Judge may seem proper.

It is clear from the examination of the plaintiff upon his affidavit made on this motion that the cause of action arose at White Horse, and that the defendants reside there.

It is argued that the appearance of Bigelow cures the defect or irregularity in the issue of the writ, and I am referred to the judgment in the case of Saskatchewan Land and Homestead Co. v. Leadlay, 6 Terr. L. R. 82. A very similar state of facts existed in that case; but the party moving to set aside the proceedings had not appeared. One party to the action appeared, and the Court held that his appearance waived the defect. I must say, with all due respect to the full Court, the judgment of which was delivered by Wetmore, J., that I cannot agree with the reasoning in that judgment, I prefer the judgment of Mr. Justice Scott, If, as is said in the judgment of Wetmore, J., the issue of a writ in the wrong division is really a nullity, that nullity could not be healed by waiver. Although the learned Judge does not use the word "nullity," yet he uses words of similar import, where he says: "Not only has there been a non-compliance with the Ordinance, but the whole proceeding has been entirely unauthorized and bad, and I cannot see how

any order of a Judge can make it good. I am also very much impressed with the argument presented in the factum of the appellant that this unauthorized process and procedure cannot be made good and valid by the simple process of transferring the proceedings to the principal clerk's office. It is true that this case has been complicated by the Leadlays having appeared. By doing so I conceive that they have submitted to the jurisdiction." Scott, J., held that the defect was an irregularity only, and that it might be cured by the Rule of the North-West Ordinances, 538, which is the same as our Rule 546, and is as follows: "Non-compliance with any of the provisions of this Ordinance shall not render any proceedings void, unless the Court or a Judge directs that such proceedings may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge thinks fit." If the issue of the writ in the wrong division is wholly bad and entirely unauthorized, and if an order of a Judge cannot make it good, I fail to see how an appearance can make it good. An appearance is nothing more than a waiver on the part of the person appearing, and it can only be a waiver of irregularity. A waiver cannot create; it can only make good what is irregular. A waiver by appearance cannot create a jurisdiction originally and ab initio wanting. It is no more than a submission to a jurisdiction already existing, and bringing oneself by appearance within an already created jurisdiction. If the writ might as well have been issued in Timbuctoo as in No. 1 district of the Yukon Territory, then no appearance could create jurisdiction in this Court for such a writ, if that is the meaning of the learned Judge's judgment. But it must be remembered that this Court has jurisdiction over the entire Yukon Territory, and that the place of the issue of the writ is matter of procedure. There are many English authorities somewhat along the lines of this case, and particularly I would refer to the case of Culton v. Radcliffe, L. R. 11 C. P. 189; also the case of Morgan v. Johnson, 1 H. Bl. 628. I, therefore, think that Rule 546 enables this Court to cure the irregularity by order, and I could now order the transference of this case to the division of the deputy clerk.

The motion is for change of venue. I think that course is also open to me now. The appearance having waived the irregularity, the case is properly before this Court, having

jurisdiction, and as to change of venue I think the English Rule 425 applies, and the principles as to change of venue laid down in the case of Campbell v. Doherty, 18 P. R. 243, are, I think, pretty well settled as being the correct principles to apply to a motion for change of venue. Upon this aspect of the case the preponderance of convenience and expense is entirely with the motion, 3 witnesses residing at White Horse and only one in Dawson, that is, upon the issue to be tried. There is a suggestion of other witnesses who may be needed upon a reference if certain findings are made upon the trial, but if certain other findings are made upon the trial then there will be no need for a reference. One must always consider the conditions of the country in determining a motion of this kind. We are peculiarly situated here, the distance being great between White Horse and Dawson; not only that, but we must take into account the length of time consumed in travelling between such remote points as well as the much greater cost of travelling in this country as compared with more settled communities. The matter involved is trifling, and the expense for witnesses would be exorbitant in comparison with the amount involved on the issue. I have consulted the counsel on both sides and suggested that, as there is provision made in this Territory for Judges going out and coming into the Territory in the fall and spring, and for the trial of causes at White Horse at such times, the venue in this case might be transferred to White Horse. Then, under Rule 256 of our Ordinance, the Judge might postpone and adjourn the trial to such time and place and upon such terms as he sees fit. I myself am going out this fall and will be able to try the case at White Horse.

The order then will be that the case be transferred for trial to White Horse, to be tried on a date to be fixed by me after hearing counsel, and upon that trial I will take such evidence as is offered in anticipation of an account. Then the time and place of trial will be fixed by me with the object of transferring the same to Dawson, there to be continued on my return to the Territory next spring. This will be a decided saving of expense, and, as counsel indicate, will be convenient for all parties.

The order will go in the meantime for the transfer of the case to White Horse for trial.

BRITISH COLUMBIA.

IRVING, J. JULY 29TH, 1908.

TRIAL.

SWANSON v. GRAHAME.

Partnership—Dissolution—Fraudulent Misrepresentations—Damages—Evidence—Forfeiture — Waiver — Contract —Counterclaim—Costs.

Action for dissolution of a partnership, on the ground of innocent misrepresentation, or, in the alternative, for damages for fraudulent misrepresentation. Counterclaim upon a contract for $25.

Peters, K.C., and Mills, K.C., for the plaintiff.

H. D. Helmcken, K.C., for defendant.

IRVING, J.:—The misrepresentations complained of were: (1) that the property was of the value of $50,000, and that the defendant had been offered that sum for the property; and (2) that the defendant, who was the owner of the mineral claim under a Crown grant giving him the precious metals, had stated that he had acquired from a cement company the right—a grant, or conveyance, or license, in writing—to take the base metals from the portion of the claim under the land owned by the cement company.

At the close of the evidence Mr. Peters admitted that he hardly expected to succeed in the contention that the representations were fraudulently made, and he also admitted, having regard to the nature of the property and to the fact that there had been a letter with reference to acquiring an option on the property, that he could not expect to succeed on the suggested misrepresentation as to the value of the property, but he pinned his faith to the second mirepresentation, which the plaintiff swore had induced him to go into the partnership.

The case made out in support of or against the charge of misrepresentation is not convincing or satisfactory. The defendant, who owned the land, is an old man, somewhat

deaf, and with a defective memory. I am not justified in relying upon everything he says.

The plaintiff is a foreigner speaking English fairly well and able to decipher a letter written in English. These two men are the main witnesses in the case. They both receive some support from friendly witnesses. I must say the plaintiff favourably impressed me when he gave his evidence at first; but at the end of the case he was contradicted by several witnesses, two of whom seem to me to be without any interest in the case whatever; the result is that I am not able to accept the plaintiff's version of what was said in January, 1906, as against the positive denial of the defendant.

Now, the real truth of the matter is that these two men, after working together, quarrelled over the working of the mine, and that the plaintiff, not wishing to have trouble with the defendant, went away, intending to return in a few days, but afterwards, some time in August, determined to bring this action on false representations. One of these alleged misrepresentations I have already dealt with. As to the other, I am not satisfied that the defendant did inform the plaintiff that he *had* obtained the base metals, nor am I satisfied that he told the plaintiff anything more than he believed, viz., that he had received, in answer to his application in respect of the base metals, a letter which he read to the plaintiff—and that he regarded that letter as a favourable answer.

In August, 1906, the defendant notified the plaintiff that he (the defendant) had forfeited the plaintiff's share and interest in the claim. This, of course, was beyond his power, and the plaintiff on his side then repudiated the partnership and demanded a settlement. It was in trying to obtain that settlement that the fact came to the knowledge of the plaintiff's solicitor that the defendant had no title to the base metals. Evidence as to what a man said is at all times very weak evidence. Words are easily mistaken, or misapplied and misunderstood. To accept as reliable the report of a conversation had in January as to a matter which has been deemed of no great importance until August, when the plaintiff began to collect his material for this law suit, would be dangerous. I therefore cannot accept the plaintiff's contention that there was a misrepresentation on this point. Furthermore, if the plaintiff ever did entertain the idea that the defendant had represented

that he obtained from the cement company the base metals, he was informed before he left work in June that such was not the case, and I regard his staying on, after he had asked the defendant to obtain for him in respect of his own claim the same rights which he, the defendant, was seeking in respect of the partnership claim, as a waiver of the misrepresentation (if any there was). I think, under these circumstances, I should dismiss the action, and allow the parties to arrange a dissolution for themselves.

I find that the plaintiff did not diligently and faithfully employ himself in the matter of the company's business as he had agreed to do. I find that he only did 54 feet of work, instead of 68 feet. I find that the plaintiff supplied materials to the extent of $37.40. I find that the plaintiff is not responsible for the damage to the shed or building.

On the counterclaim I cannot give judgment for the defendant for $25, as the contract seems to have been made with the defendant's wife. The plaintiff having succeeded on the counterclaim, I give to him the costs thereof.

WESTERN LAW REPORTER

CANADA

INDEX-DIGEST TO VOLUME VIII. (APRIL-AUGUST, 1908).

ABANDONMENT.

See Contract, 8—Mechanics' Liens, 5—Vendor and Purchaser, 1.

ABATEMENT.

See Vendor and Purchaser, 22.

ABSCONDING DEBTORS.

See Attachment of Goods.

ACCOUNTS.

See Banks and Banking—Contract, 7—Executors and Administrators, 3, 4.

ACKNOWLEDGMENT.

See Limitation of Actions—Sale of Goods, 4 — Vendor and Purchaser, 21.

ACQUIESCENCE.

See Will, 2.

ADMINISTRATOR.

See Executors and Administrators.

ADVERTISEMENTS.

See Assessment and Taxes, 2—Mortgage, 5.

AFFIDAVITS.

See Attachment of Debts, 1—Attachment of Goods—Costs, 7, 10—Distribution of Estates—Land Titles Act, 1—Judgment, 3, 4—Practice, 3.

AGENT.

See Principal and Agent—Trade Union, 3—Vendor and Purchaser, 5. 7.

AGISTMENT.

See Bailment.

ALBERTA ACT.

See Constitutional Law, 4.

ALBERTA ASSIGNMENTS ACT.

See Bankruptcy and Insolvency, 2.

ALBERTA VILLAGE ACT.

See Municipal Elections, 1.

ALIENS.

Naturalization — Procedure — Naturalization Act—Amendment — Construction—Powers of County Court Judge — Investigation — Cross-examination on Affidavits: Re Malsufuro (B.C.), 37.

See Constitutional Law.

AMENDMENT.

See Contract, 1—Dominion Lands Act —Easement — Judgment, 4—Mortgage, 4—Parties—Pleading — Practice, 1—Prairie Fire Ordinance — Railway, 7.

ANCILLARY PROBATE.

See Executors and Administrators, 2.

ANIMALS.

See Bailment—Sale of Goods, 12.

APPEAL.

To Yukon Territorial Court en Banc — Extension of Time for—Explanation of Delay — Special Circumstances: Moore v. Shackleford (Y.T.), 1.

See Costs, 3—Criminal Law, 6—Injunction, 1—Liquor License Act — Master and Servant, 1—Mortgage. 4—Practice, 2—Prairie Fire Ordinance — Solicitor, 3—Vendor and Purchaser, 3, 6, 10.

APPEARANCE.

See Practice, 6—Vendor and Purchaser, 16.

ARBITRATION AND AWARD.

Motion to Set aside Award—Notice of Motion instead of Summons—Irregularity—Waiver — Submission to Arbitration — Appointment of Umpire — Misconduct of Arbitrators — Refusal to Hear Evidence—Hearing Evidence in Absence of one Party—Interference of Umpire: Re Annable and Annable (Sask.), 132.

See Costs, 2—Railway, 6.

ASSESSMENT AND TAXES.

1. "Occupant" of Timber Berth — License from Dominion Government—Local Improvement Ordinance, 1903—Powers of District Council — Resolution — Validity — Money Payment—Commutation — Day Labour—Notice — Posting up—Assessment Roll—Time for Adding Names — Provisions of Statute — Imperative or Directory: Local Improvement District No. 26 A 5 v. Walters (Alta.), 176.

2. Tax Sale—Sale of Unpatented Lands as Patented—Action by Purchaser to Recover Purchase Money and Amounts Paid for Subsequent Taxes—Voluntary Payments — Dominion Lands—Interest in—Powers of Provincial Legislature—Failure of Consideration — Treasurer of Rural Municipality—Powers of—Statutory Officer — Agent of Municipality — Advertisement — Warranty that Lands Offered for Sale Patented — Presumption — Caveat Emptor — Misrepresentation — Damages—Interest — Costs: Alloway v. Rural Municipality of Morris (Man.), 726.

See Municipal Elections, 2.

ASSESSORS.

See Ship, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Bankruptcy and Insolvency.

ASSIGNMENT OF CHOSE IN ACTION.

See Equitable Assignment—Judgment, 1—Master and Servant, 5.

ASSIGNMENT OF CONTRACT.

See Contract, 9.

ASSIGNMENT OF COVENANT.

See Covenant.

ASSIGNMENT OF MONEYS.

See Attachment of Debts, 5—Bankruptcy and Insolvency, 4.

ASSIGNMENT OF SHARES.

See Bankruptcy and Insolvency, 3.

ASSIGNMENTS ACT.

See Fraudulent Conveyance — Service out of Jurisdiction.

ATTACHMENT OF DEBTS.

1. Attaching Order before Judgment — Affidavit—"Actual Amount of Debt, Claim, or Demand Due and Owing"—Action for Damages for Tort — Application of Rule 759: McIntyre v. Gibson (Man.), 202.

2. Balance of Purchase Money of Business of Partnership — Promissory Note in Favour of Wife of one Partner—Rights of Creditors of Firm and of Individual Partners — Debt Actually Due by Partner to Wife—Garnishee Proceedings Ineffective: Minger & Weber v. Anderson (Alta.), 428.

3. Garnishee Summons before Judgment—Nature of Claim in Principal Action — "Debt or Liquidated Demand"—Action for Partnership Account—Amount Involved — Promptness in Proceeding with Action where Garnishee Summons Issued: Alexander v. Thompson (Alta.), 659.

4. Gold Dust Delivered to Garnishee in Parcel to be Handed to Judgment Debtor—Whether Garnishable under Rule of Court: Barnard v. Freeman (Y.T.), 721.

5. Moneys Attached Claimed under Assignment—Order Directing Trial of Issue—Parties — Mesne Assignee—Burden of Proof—Plaintiff in Issue: Toseo v. Campbell (Y.T.), 719.

6. Moneys Attached Paid into Court by Garnishees—Claim by Assignees of Judgment Debtors—Judgment Creditors Setting up Defence Invoked by Garnishees—Invalidity of Con-

tract — Foreign Companies Ordinance: Beaver Lumber Co. v. Northern Construction Co. (Sask.), 782.

7. Moneys Payable at a Particular Time —Written Instrument Acknowledging Debt—Form of—Promissory Note —Moneys not Attachable before Maturity: Halsted v. Herschmann (Man.), 641.

See Interpleader, 1.

ATTACHMENT OF GOODS.

Absconding Debtors—Action for Money Demand—Jurisdiction of Court — Cause of Action — Foreigners — Domicile — Rules 201, 202—Tort—Conversion of Money abroad—Detention in Manitoba—Contract — Motion to Set aside Order of Attachment—Service of Papers—Statement of Claim—Substituted Service —Personal Service of Foreigners in Jurisdiction — Affidavits — Defendants out of Jurisdiction—Temporary Residence in Jurisdiction—Rule 183: Emperor of Russia v. Prospouriakoff (Man.), 461.

ATTORNEY-GENERAL.

See Mines and Minerals, 1.

AWARD.

See Arbitration and Award.

BAILMENT.

Agistment—Loss of Horse—Negligence—Liability of Bailee: Ferrara v. Bligh (B.C.), 245.

See Negligence, 1.

BANKRUPTCY AND INSOLVENCY.

1. Action by Assignee for Benefit of Creditors to Set aside Chattel Mortgage Made by Assignor—Insolvency — Past Indebtedness—Mortgage Valid as Respects Goods Exempt under sec. 29 of Executions Act: Bates v. Cannon (Man.), 575.

2. Alberta Assignments Act—Transfer of Property by Insolvent to Creditor—Action to Set aside, Brought within Sixty Days—Presumption—Rebuttal —Absence of Intent to Defeat Creditors—Substance of Transaction—Rescission of Contract for Purchase made by Insolvent—Restoration to Vendor—Vendor's Lien not Waived by Acceptance of Promissory Note for Part of Purchase Money: High River Meat Market v. Routledge (Alta.), 259.

3. Assignment of Shares — Assignments Act—Seizure under Execution — Assignment Void as against Execution Creditors—Interpleader Issue: Potts v. Imperial Bank of Canada (Man.), 583.

4. Assignments of Moneys to Bank — Bona Fides—Security — Bank Act, sec. 80—Belief of Bank Manager in Solvency of Customer—Book Debts — Moneys to Arise from Future Contracts — Pledge—Consideration —Assignment for Benefit of Creditors—Transaction within 60 Days —Assignments Act, sec. 41—Costs: Norton v. Canadian Bank of Commerce (Sask.), 910.

BANKS AND BANKING.

Collateral Security Deposited with Bank to Secure Payment of Promissory Notes and Advances—Memorandum of Hypothecation—Judgment—Settlement—Account—Fiduciary Relationship — Trustees — Breach of Trust — Failure to Exercise Due Diligence in Realizing Securities—Bona Fides—Tender of Reconveyance — Laches — Interest — Rate of — Overpayment — Illegal Rate — Contract—Pass-book — Estoppel —Parties — Costs: Barrette v. Canadian Bank of Commerce and Syndicat Lyonnais Du Klondike (Y. T.), 927.

See Bankruptcy and Insolvency, 4—Discovery, 3—Equitable Assignment.

BAWDY HOUSE.

See Criminal Law, 11.

BEHRING SEA AWARD ACT.

See Ship, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Promissory Notes.

BILLS OF SALE.

1. Invalidity — Security — Mala Fides—Contract — Construction — Sale of Goods — Property not Passing — Scope of Contract — Priorities: Bloomstein v. J. D. McArthur Co. (Man.), 753.

2. Validity as against Execution Creditors of Bargainor—Consideration—Marriage Settlement — Past Indebtedness — Consideration not Truly Expressed — Bills of Sale Ordinance, sec. 11—Interpleader: Saskatchewan Lumber Co. v. Michaud (Sask.), 946.

See Chattel Mortgage—Sale of Goods, 5.

BOARD OF RAILWAY COMMISSIONERS.

See Railway, 2, 7, 8.

BONUS.

See Master and Servant, 2.

BOOK DEBTS.

See Bankruptcy and Insolvency, 4.

BRITISH COLUMBIA COMPANIES ACT.

See Sale of Goods, 3.

BRITISH COLUMBIA IMMIGRATION ACT.

See Constitutional Law.

BUILDING.

See Landlord and Tenant, 4.

BUILDING CONTRACT.

See Contract, 1, 9—Mechanics' Liens.

BY-LAW.

See Highway—Municipal Corporations, 1—Railway, 1.

CARRIERS.

Contract for Carriage of Goods—Action for Damages for Breach by Failure to Deliver in Time — Lien for Freight — Evidence: Ludwig v. Beede (Y.T.), 973.

See Railway, 2.

CAVEAT EMPTOR.

See Assessment and Taxes, 2—Vendor and Purchaser, 6.

CERTIFICATE OF TITLE.

See Land Titles Act—Mortgage, 1.

CERTIORARI.

See Criminal Law, 5—Railway, 7, 8.

CHAMBERS SUMMONS.

See Practice, 1, 4.

CHARGE ON LAND.

See Dominion Lands Act.

CHATTEL MORTGAGE.

Registration in Province of Saskatchewan—Fraudulent Removal of Goods into Alberta and Sale to Innocent Purchaser—Action in Alberta by Mortgagee against Purchaser for Conversion—Territorial Bills of Sale Ordinance — Effect of — Alberta Act — Saskatchewan Act — Registration Districts—Re-registration on Removal — Validity of Mortgage as against Purchaser — Description of Goods—Sufficiency — Damages for Detention — Interest on Price Paid: Jones v. Twohey (Alta.), 295.

See Bankruptcy and Insolvency—Bills of Sale — Promissory Notes, 2 — Sale of Goods, 4—Service out of Jurisdiction.

CHEQUE.

See Mandamus.

CHOSE IN ACTION.

See Equitable Assignment—Judgment, 1 —Master and Servant, 5.

COLLATERAL SECURITIES.

See Banks and Banking—Promissory Notes, 4.

COLLISION.

See Ship, 1, 2.

COLLUSION.

See Costs, 9.

COMMISSION.

See Principal and Agent—Vendor and Purchaser, 5.

COMPANY.

1. Winding-up—Claim against Assets — Solicitor's Bill—Services Rendered in Procuring Incorporation — Services Rendered after Incorporation—Taking Benefit of Services—Validity of Assessment to Pay for Services —Reserve Fund: Re Crown Mutual Hail Insurance Co. (Man.), 580.

2. Winding-up — Petition—Preliminary Objections—Irregularity—Failure to Indorse Petition with Solicitor's Name and Address—Indorsement of Notice of Motion Served with Petition— Sufficiency — Status of Petitioners — Foreign Company not Registered in Jurisdiction — No Agent or Office in Jurisdiction—" Proceeding in Respect of a Contract " — " Proceeding in the Court "—Dominion Winding-up Act: Re Nelson Ford Lumber Co. (Sask.), 546.

3. Winding-up—Petition—Status of Petitioners—Foreign Company not Registered—Foreign Companies Ordinance: Re Nelson Ford Lumber Co. (Sask.), 79.

4. Winding-up — Voluntary Liquidation under Manitoba Winding-up Act—Application by Liquidators for Direction as to Proceeding against Directors—Misappropriation of Funds of Company — Fraud — Rights of Minority of Shareholders—No Jurisdiction in Court to give Direction —Status of Liquidators—Costs: Re Great Prairie Investment Co. (Man.), 6.

See Attachment of Debts, 6—Practice, 6—Promissory Notes, 6 — Sale of Goods, 3.

COMPENSATION.

See Costs, 2, 4—Executors and Administrators, 3.

CONCEALMENT WITH INTENT TO ESCAPE.

See Criminal Law, 4.

CONCILIATION BOARDS.

See Trade Union, 3.

CONDITIONAL SALES.

See Sale of Goods ,4, 5, 6.

CONSPIRACY.

See Trade Union, 2.

CONSTITUTIONAL LAW.

1. British Columbia Immigration Act, 1908—Ultra Vires—B. N. A. Act, sec. 95—Legislative Field Occupied by Dominion Legislation — Costs against Crown: Rex v. Narain (B. C., 790.

2. British Columbia Immigration Act, 1908 — Ultra Vires — Immigration Legislation—Field Occupied by Dominion Parliament—Treaty with Japan: Re Nakane, Re Okasake (B. C.), 19.

3. Dominion Immigration Act, 1907, sec. 30—Order in Council—Ultra Vires—Prohibition against Landing of Specified Classes of Immigrants—Delegation of Duty of Governor in Council to Minister of Interior—Detention of Aliens—Discharge: Re Behari Lal (B.C.), 129.

4. Jury Ordinance, N. W. T., not in Force in Alberta—Alberta Act: Toll v. Canadian Pacific R. W. Co. (Alta.), 795.

See Assessment and Taxes, 2—Chattel Mortgage—Sale of Goods, 3.

CONTRACT.

1. Building Contract — Action for Balance of Contract Price—Building not Completed according to Plans and Specifications—Trivial Details—Substantial Completion — Possession Taken by Defendant—Failure to Call Attention to Unfinished Parts—Waiver — Estoppel — Amendment: Davis v. O'Brien (Man.), 562.

2. Illegality—Sale of Acetylene Gas—Gas Inspection Act—Certificate of Inspector — Posting up — Testing Place — Connections — Non-compliance with Requirements of Act—Prohibition of Sale—Protection of Public—Local Inspector: Carberry Gas Co. v. Hallett (Man.), 119.

3. Purchase of Interest in Mining Property—Payment of Money—Failure to Convey—Action to Recover Money Paid—Defence—Novation — Substitution of Debtor—Release—Absence of Writing — Statute of Frauds—Evidence: Irw'n v. Kelly (Y.T.), 95, 855.

4. Remuneration for Services—Selection of Land for Purchase—Principal and Agent—Evidence of Oral Contract—Secret Profits — Illegal Contract: Hayes v. Day (Alta.), 143.

5. Sale of Engine—Price of Work Done in Connecting with Machine—Whether Included in Contract Price—Evidence—Estoppel—Costs: Hutchison Brothers & Co. Limited v. Perkins (B.C.), 16.

6. Sale of Goods to be Manufactured—Delay in Delivery—Destruction of Property for which Goods Required—Time—Tender — Impossibility of Performance: Luxfer Prism Co. v. Macleod (Sask.), 627.

7. Work and Labour—Building Ditch to Carry Water to Defendants' Mining Property—Time of Completion—Delay — Waiver — Extra Work—Acceptance — Payment — Tender — Counterclaim — Damages — Accounts—Reference—Costs: Bannerman v. Detroit Yukon Mining Co. (Y.T.), 714.

8. Work and Labour — Construction of Contract — Abandonment—Acceptance of Part of Work Actually Done—Payment for Value of Work—Municipal Corporation — Contract not under Seal—Powers of Corporation—Receiving Benefit of Work: Sieling v. Village of Kronau (Sask), 552.

9. Work and Services—Installation of Heating Plant in House — Assignment of Contract by Contractor—Consent of Owner—Substantial Completion of Work—Acceptance—Guaranty — Temperature — Compliance with Contract—Extras — Breach of Contract — Counterclaim — Damages: Regina Heating and Plumbing Co. v. Gillespie (Sask.), 93.

See Attachment of Debts, 6—Attachment of Goods—Banks and Banking—Bills of Sale—Carriers—Costs, 1—Dominion Lands Act—Executors and Administrators, 4—Mechanics' Liens—Mortgage, 2—Municipal Corporations, 1—Partnership, 2—Principal and Agent—Promissory Notes—Railway, 1—Sale of Goods—Trade Union, 3—Vendor and Purchaser.

CONTRACT OF HIRING.

See Master and Servant.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 4—Railway, 5.

CONVERSION.

See Chattel Mortgage.

CONVICTION.

See Criminal Law—Justice of the Peace—Prairie Fire Ordinance—Railway, 7, 8.

COSTS.

1. Action for Specific Performance of Contract for Sale of Land—Action Prematurely Brought — Payment of Purchase Money by Instalments—Defect in Title: Rutherford v. Walker (Alta.), 52.

2. Dominion Railway Act—Arbitration—Compensation—Reference to Taxing Officer — Principle of Taxation—"Costs, Fees, Counsel Fees, and Expenses of the Arbitration"—Solicitor and Client — Tariff of Costs—Items—Work done before Appointment of Arbitrators — Arbitrators' Fees—Payment by Owner — Inclusion in Bill of Costs—Quantum of Counsel Fees — Witness Fees—Expert Witnesses—Costs of Taxation: Re Canadian Northern R. W. Co. and Robinson (Man.), 137.

3. Quantum — Statute Limiting — Construction—Interlocutory Application and Appeal — "Action or Proceeding:" Traders Bank v. Wright (Man.), 747.

4. Railway — Expropriation of Land—Action for Trespass—Offer of Compensation—General Costs of Action: Calvert v. Canadian Northern R. W. Co. (Man.), 379.

5. Right to—Mortgagees' Costs—Correspondence and Attendances — Discretion—Taxation: Confederation Life Association v. Leier (Sask.), 343.

6. Scale of — "Amount Recovered"—Money Paid into Court: Johnston v. Hadden (B.C.), 526.

7. Security for — Nominal Plaintiff—Proof of Solvency—Onus—Affidavit—Leave to Add Real Plaintiff: Jalbert v. Jensen (Y.T.), 377.

8. Security for—Residence out of Jurisdiction—"Ordinarily Resident"—Roving Plaintiffs: Allman v. Yukon Consolidated Gold Fields Co. (Y.T.), 371.

9. Settlement of Action—Collusion—Depriving Plaintiff's Solicitor of Costs—Order for Payment of Costs by Defendants: Stewart v. Hall (Man.), 479.

10. Taxation — Defendants Severing — Right of Defendants to Separate Sets of Costs — Separate Defences Delivered by same Solicitor—Discretion of Taxing Officer — Items of Bills—Instructions to Defend—Attempted Examination for Discovery —Conduct Money — Attendance of Solicitors — Third Party Notice—Witness Fees at Trial—Affidavits of Defendants: Union Investment Co. v. Pullishy (Alta.), 530.

See Assessment and Taxes, 2 — Bankruptcy and Insolvency, 4—Banks and Banking — Company, 4—Constitutional Law, 1—Contract, 5, 7—Defamation — Dominion Lands Act—Equitable Assignment — Executors and Administrators 3, 4—Fraud and Misrepresentation, 1—Injunction, 1, 2—Landlord and Tenant, 2—Malicious Prosecution—Master and Servant, 3 — Mechanics' Liens, 1, 2—Mortgage, 4, 5—Partnership, 1, 2—Pleading — Practice, 1 — Sale of Goods, 4, 7—Solicitor, 1, 2, 3—Vendor and Purchaser, 8, 11, 12, 19, 22.

COUNCILLORS.

See Municipal Elections.

COUNSEL FEES.

See Costs, 2—Solicitor, 3.

COUNSELLING OFFENCE.

See Criminal Law, 2.

COUNTERCLAIM.

See Judgment, 1—Mortgage, 4—Partnership, 1, 2—Sale of Goods, 2, 3, 7, 9, 10—Vendor and Purchaser, 13.

COUNTY COURT JUDGE.

See Aliens—Criminal Law, 7—Liquor License Act.

COUNTY COURTS.

Action on Promissory Notes—Failure of Plaintiffs to Prove Presentment—Non-presentment not Alleged in Dispute Note—Defence not Open to Defendant: Teague v. Scoular (Man.), 199.

See Notice of Trial.

COVENANT.

Restraint of Trade—Sale of Goodwill of Business—Informal Document—Admissibility of Parol Evidence to Supplement—Operation of Covenant—Time and Place — Assignment of Covenant—Parties — Injunction—Damages: Novak v. Abrahams (Y. T.), 922.

See Mortgage, 1.

CRIMINAL LAW.

1. Evidence — Proof of Blood Relationship on a Charge of Incest: Rex v. Smith (B.C.), 184.

2. Indictment for Counselling or Procuring the Commission of an Indictable Offence—Evidence that Offence to be Committed in a Foreign Country—Mistrial—New Trial—Admissibility of Evidence — Sufficiency — Corroboration: Rex v. Walkem (B.C.), 857.

3. Indictment for Murder — Judge's Charge — Withdrawal from Consideration of Jury of Question whether Evidence Shews merely Manslaughter —Crown Case Reserved — Criminal Code: Rex v. Barrett (Sask.), 877.

4. Indictment of Prisoner for Concealing himself with Intent to Escape from Prison—Not an Offence — Criminal Code—Indictment Quashed—Plea of Guilty Struck out: Rex v. Labourdette (B.C.), 402.

5. Magistrate's Conviction—Evidence Returned on Certiorari Taken down by Stenographer not Sworn—Invalidity of Conviction—Jurisdiction — Seal: Rex v. L'Heureux (Y.T.), 975.

6. Order of Magistrate Requiring Accused to Furnish Security to Keep the Peace—Criminal Code, secs. 748, 749—Right of Appeal: Rex v. Mitchell (Y.T.), 357.

7. Procedure — Summary Trial before County Court Judge — Election of Prisoners—Indictment at Assizes—Grand Jury—Prisoners called on to Plead—Re-election: Rex v. Thompson (Man.), 3.

8. Rape — Verdict of Guilty — Judge's Charge — Exclusion of Verdict of Guilty of Minor Offence—Practical Exclusion of any Verdict but Guilty of Rape—Misdirection—New Trial: Rex v. Scherf (B.C.), 219.

9. Usury—Money Lenders Act—Loan—Rate of Interest—"Money Lender"—Practice of Lending Money at Usurious Rates—Evidence: Rex v. Clerg (Man.), 572.

10. Vagrancy—Criminal Code, sec. 238 (a)—Means of Support—Gambling—Evidence: Rex v. Sheehan (B.C.), 605.

11. Vagrancy — Frequenter of Bawdy House—Statutory Offence — Necessity for Request to Person Charged to Give an Account of herself—Police Officer: Rex v. Regan (B.C.), 525.

12. Vagrancy — Prostitute—Conviction not Stating that Accused was Asked to Give an Account of Herself—Criminal Code, sec. 238 (i)—Conviction Following Words of Statute—Information — Plea of Guilty—Waiver of Objections—Form of Information — Reference to Repealed Statute—Surplusage: Rex v. Harris (Y.T.), 633.

See Justice of the Peace—Prairie Fire Ordinance—Railway, 7, 8.

CROPS.

See Emblements.

CROSS-APPEAL.

See Vendor and Purchaser, 3.

CROWN.

See Constitutional Law, 1—Easement—Highway.

CROWN CASE RESERVED.

See Criminal Law, 3.

CROWN REGULATIONS.

See Mines and Minerals, 2.

DAMAGES.

See Assessment and Taxes, 2—Chattel Mortgage—Contract, 7, 9—Covenant—Defamation, 1, 2—Emblements—Fraud and Misrepresentation, 1—Injunction, 2—Judgment, 1—Landlord and Tenant, 2, 4—Malicious Prosecution—Master and Servant, 1, 4—Mechanics' Liens, 1 — Mines and Minerals, 2 — Municipal Corporations, 1—New Trial — Nuisance—Partnership, 2—Promissory Notes, 2—Railway, 3, 4, 5, 9—Sale of Goods, 7, 9, 10—Trade Union, 1, 2—Vendor and Purchaser, 3, 9, 11, 18, 19, 24, 26.

DECEIT.

See Fraud and Misrepresentation—Vendor and Purchaser, 26.

DECLARATION OF VOTER.

See Municipal Elections, 2.

DEDICATION.

See Highway.

DEED.

See Mortgage.

DEFAMATION.

1. Libel — Privilege — Fair Comment—Newspaper — Publication of Statement Made by Third Person Reflecting on Plaintiff—Relation to Report of Civic Investigation — Repeating Statements Made at Investigation—Stating Facts which Might have been Related at Investigation — Damages—Mitigation—Costs—Scale of: Patterson v. Edmonton Bulletin Co. (Alta.), 672.

2. Slander—Proof of Defamatory Words—Pleading — Variance—Words Affecting Plaintiff in his Trade—Not Necessary to Prove Special Damage—Damages—Costs: Rutledge v. Astell (Sask.), 934.

See New Trial—Parties.

DIRECTORS.

See Company, 4.

DISCOVERY.

1. Examination of Plaintiff—Nature and Scope of Examination — Rules of Court—Alteration—Omission: McInnes v. British Columbia Electric R. W. Co. (B.C.), 277.

2. Inspection and Analysis of Medical Preparations—Passing off Goods on Public: Theo Noel Co. v. Vita Ore Co. (Man.), 643.

3. Production of Documents—Inspection—Privilege — Mortgage—Books of Bank—Bank Act—Fraud—Preliminary Issue—Appointment of Accountant as Agent to Inspect Books—Grounds for: Canadian Bank of Commerce v. Wilson (Y.T.), 268.

See Costs, 10.

DISMISSAL OF ACTION.

See Practice, 2—Sale of Goods, 4.

DISMISSAL OF SERVANT.

See Master and Servant, 1, 2.

DISPUTE NOTE.

See County Courts.

DISTRESS.

See Landlord and Tenant, 2, 4.

DISTRIBUTION OF ESTATES.

Claims against Intestates' Property in Hands of Administrator—Affidavit—Jurat—Practice—Solicitor's Account—Evidence as to Services Rendered—Notice to Administrator of Claim—Proceedings to Establish—Action—Originating Summons — Rules of Court — Reference—Distribution of Surplus—Next of Kin: Re Mussetter (Sask.), 704.

DISTRICT COURTS.

See Judgment, 4 — Malicious Prosecution.

DISTRICT COURTS ACT.

See Landlord and Tenant, 5.

DITCHES.

See Easement—Mines and Minerals, 2.

DOMICILE.

See Attachment of Goods—Practice, 3.

DOMINION IMMIGRATION ACT.

See Constitutional Law, 3.

DOMINION LANDS ACT.

Lien or Charge on Land for Purchase Price of Machinery—Agreement to Give—Mortgage of Homestead before Recommendation for Patent—Invalidity — Statutes—Action for Price—Amendment—Declaration of Lien — Costs: Waterous Engine Works Co. v. Weaver (Sask.), 432.

See Mines and Minerals, 1—Railway, 9.

DURESS.

See Vendor and Purchaser, 2.

EASEMENT.

Prescription — Ditch — Statutory Authority — Crown—Statutory Easement—Maintenance of Ditch—Pleading—Amendment—Vendor and Purchaser: Gray v. Daniels (B.C.), 246.

ELECTION.

See Criminal Law, 7—Parties—Vendor and Purchaser, 3, 22.

ELECTIONS.

See Municipal Elections.

EMBLEMENTS.

Sale of Growing Hay to be Severed by Purchaser — Interest in Land or Chattels—Breach of Implied Warranty of Title—Damages: Fredkin v. Glines (Man.). 587.

EMPLOYERS' LIABILITY ACT.

See Master and Servant, 3.

EQUITABLE ASSIGNMENT.

Fund in Bank—Claim of Execution Creditor—Receiving Order—Priorities—Time — Interpleader — Payment of Execution Creditor's Claim in Full—Refund of Sufficient to Pay Prior Claim of Assignee of Fund—Costs: Detro v. Haggard (Alta.), 156.

EQUITABLE RELIEF.

See Judgment, 2.

ESCAPE.

See Criminal Law, 4.

ESCROW.

See Vendor and Purchaser, 10.

ESTOPPEL.

See Banks and Banking—Contract, 1, 5—Fraud and Misrepresentation, 2—Landlord and Tenant, 2—Mechanics' Liens, 4—Vendor and Purchaser, 4, 21.

EVICTION.

See Promissory Notes, 2.

EVIDENCE.

1. Foreign Commission — Examination abroad of Officers of Plaintiff Company—Production of Books of Company before Commissioner—Convenience—Case made on Affidavits: Canadian Railway Accident Insurance Co. v. Kelly (Man.), 738.

2. Foreign Commission — Examination abroad of Plaintiff on his own Behalf — Bona Fides — Discretion: Cleveland v. Asam (Y.T.), 970.

3. Foreign Commission — Second Commission — Postponement of Trial—Terms — Costs: Canadian Bank of Commerce v. Matheson (Y.T.), 972.

See Arbitration and Award—Carriers—Contract, 3, 4, 5—Covenant—Criminal Law, 1, 2, 3, 5, 9, 10—Discovery—Executors and Administrators, 2—Highway—Husband and Wife, 1, 2—Injunction, 1 — Interpleader, 3—Justice of the Peace—Land Titles Act, 1—Landlord and Tenant, 3—Master and Servant, 7—Mechanics' Liens, 1, 6—Mines and Minerals, 2—Mortgage, 2—Municipal Corporations, 1—Nuisance—Partnership, 1, 2—Prairie Fire Ordinance—Principal and Agent—Promissory Notes, 1, 4, 7—Railway, 4, 5, 7, 8—Sale of Goods, 1, 2, 5, 7, 8, 10, 12—Ship, 1, 2, 3—Solicitor, 4—Vendor and Purchaser, 2, 5, 11, 25, 26—Will, 1.

EXAMINATION OF OFFICERS OF COMPANY.

See Evidence, 1.

EXAMINATION OF PARTIES.

See Evidence, 2.

EXCHANGE OF LANDS.

See Vendor and Purchaser, 26.

EXECUTION.

See Bankruptcy and Insolvency, 3—Husband and Wife, 1—Land Titles Act, 3—Mortgage, 7—Sale of Goods, 5.

EXECUTION CREDITORS.

See Bills of Sale, 2—Equitable Assignment—Interpleader, 2—Mortgage, 7.

EXECUTIONS ACT.

See Bankruptcy and Insolvency, 1.

EXECUTORS AND ADMINISTRATORS.

1. Action under Fatal Accidents Act—Status of Infant Widow as Plaintiff—Grant of Letters of Administration to Infant Valid until Revoked—Infant Suing without Next Friend—Irregularity—Waiver: Toll v. Canadian Pacific R. W. Co. (Alta.), 795.

2. Application by Foreign Executors for Ancillary Probate of Will—Proof of Letters Testamentary Granted in Foreign Court—Saskatchewan Evidence Act, 1907, sec. 15—Certificate of Clerk of Court—Seal: Re Wolf (Sask.), 690.

3. Compensation for Services—Jurisdiction of Territorial Court—Rules of Court—Passing of Accounts — Payments to Solicitors—Moderation of Costs—Payments to Agents for Services: Re Phiscator (Y.T.), 116.

4. Executor's Accounts—Agreement with Residuary Legatee—Enforcement—Remedy—Action—Originating Summons—Costs: Re Wilson (Alta.), 607.

5. Official Administrator—Power to Sell Land of Intestate—No Necessity for Order—Official Administrators Act—Amending Act, 1900—Intestate Estates Act: Re Nelson (B.C.), 200.

See Distribution of Estates.

EXEMPTIONS.

See Bankruptcy and Insolvency 1—Mortgage, 7.

EXPROPRIATION.

See Costs, 4.

EXTRA-PROVINCIAL COMPANY.

See Sale of Goods, 3, 7.

EXTRAS.

See Mechanics' Liens, 4.

FAIR COMMENT.

See Defamation, 1.

FATAL ACCIDENTS ACT.

See Executors and Administrators, 1.

FENCES.

See Railway, 3.

FIDUCIARY RELATIONSHIP.

See Banks and Banking.

FIRE.

See Prairie Fire Ordinance.

FIREGUARD.

See Railway, 7, 8.

FORECLOSURE.

See Land Titles Act, 4—Mortgage, 1-4.

FOREIGN COMMISSION.

See Evidence.

FOREIGN COMPANY.

See Practice, 6—Promissory Notes, 6—Sale of Goods, 3, 7.

FOREIGN COMPANIES ORDINANCE.

See Attachment of Debts, 6—Company, 2, 3—Practice, 6—Promissory Notes, 6—Sale of Goods, 7.

FOREIGN EXECUTORS.

See Executors and Administrators, 2.

FORFEITURE.

See Landlord and Tenant, 3—Partnership, 2—Ship, 3—Vendor and Purchaser, 15, 16, 18, 20.

FRAUD AND MISREPRESENTATION.

1. Sale of Land—Action to Set aside—Untrue Representations of Purchaser—Immateriality—Damage not Directly Resulting — Dismissal of Action—Costs—Depriving Successful Parties of: Nicholson v. Peterson (Man.), 750.

2. Transfer of Land Procured by Fraud—Resale and Transfer by Fraudulent Grantee—Action to Set aside Transfers—Proof of Bona Fide Purchase for Value without Notice—Badges of Fraud—Estoppel—Registration of Transfers—Parties to Action—Trustee for Grantor—Injunction — Cancellation of Transfers: Swanson v. Getsman (Sask.), 762.

See Assessment and Taxes, 2—Company, 4 — Discovery, 3 — Injunction, 1—Judgment, 3 — Partnership, 1, 2—Promissory Notes, 1, 3, 5—Sale of Goods—Vendor and Purchaser, 5, 6, 10, 11, 21, 22, 26.

FRAUDULENT CONVEYANCE.

Action by Judgment Creditor of Grantor to Set aside—Security for Debt—Intent to Defeat other Creditors—Fraud — Preference — Assignments Act — Consideration: Christie v. Shroeder (Man.), 757.

See Bankruptcy and Insolvency.

FREIGHT.

See Carriers.

GAMBLING.

See Criminal Law, 10.

GARNISHMENT.

See Attachment of Debts—Interpleader, 1.

GAS INSPECTION ACT.

See Contract, 2.

GIFT.

See Municipal Corporations, 1.

GOLD COMMISSIONER.

See Mines and Minerals, 1.

GOODWILL.

See Covenant.

GRAND JURY.

See Criminal Law, 7.

GUARANTY.

See Contract, 9.

HIGHWAY.

Purchase of Land for, by Municipal Corporation—Dedication — Evidence of —Land Becoming Vested in Crown —Rights of Subsequent Purchaser for Value without Notice—Registry Laws—By-law: Pulkrabek v. Rural Municipality of Russell (Man.), 8.

See Railway, 1.

HIRE RECEIPTS.

See Sale of Goods, 4, 5. 6.

HOLIDAY.

See Practice, 2.

HOMESTEAD.

See Dominion Lands Act—Mortgage, 7—Railway, 9.

HUSBAND AND WIFE.

1. Business Carried on by Husband in his own Name Alleged to be Property of Wife—Seizure of Plant and Stock of Business under Execution against Husband—Claim by Wife—Interpleader Issue—Evidence—Married Woman's Separate Estate—Statutes—Burden of Proof—Change in Business — Notice — Registration of Declaration: Davison v. Schwartz (Y.T.), 359.

2. Goods Supplied for Household Use—Liability of Wife—Agency for Husband — To whom Credit Given?—Evidence: Vopni v. Bell (Man.). 205.

See Attachment of Debts, 2—Landlord and Tenant, 3—Railway, 5.

HYPOTHECATION.

See Banks and Banking.

ILLEGAL CONTRACT.

See Contract, 2, 4.

ILLEGAL SEALING.

See Ship, 3.

IMMIGRATION.

See Constitutional Law.

IMPOSSIBILITY OF PERFORMANCE.

See Contract, 6.

IMPROVEMENTS.

See Landlord and Tenant, 5 — Mechanics' Liens, 4—Vendor and Purchaser, 24.

INCEST.

See Criminal Law, 1.

INDUSTRIAL DISPUTES ACT.

See Trade Union, 3.

INFANT.

See Executors and Administrators, 1—Mines and Minerals, 1—Promissory Notes, 7.

INFORMATION.

See Justice of the Peace.

INJUNCTION.

1. Interim Order—Action on Behalf of all Creditors — Injunction Restraining Debtor from Transferring his Property before Judgment — Pleading—Statement of Claim—Insufficiency — Evidence — Fraud — Parties—Fraudulent Grantor — Costs—Appeal: Traders Bank of Canada v. Wright (Man.), 105, 208, 589.

2. Interim Order—Usual Undertaking as to Damages — Plaintiff out of the Jurisdiction—Undertaking of Solicitor or other Responsible Person in Jurisdiction — Practice — Costs: Kent v. Clarke (Sask.), 617.

See Covenant — Fraud and Misrepresentation, 2—Landlord and Tenant, 2—Mines and Minerals, 2 — Nuisance — Railway, 1 — Trade Union, 1, 2.

INSOLVENCY.

See Bankruptcy and Insolvency.

INSPECTION.

See Discovery, 2, 3—Sale of Goods, 9.

INSTALMENTS.

See Costs, 1—Judgment, 2—Mortgage, 2—Sale of Goods, 4—Vendor and Purchaser.

INTEREST.

See Assessment and Taxes, 2—Banks and Banking—Chattel Mortgage — Criminal Law, 9—Judgment, 2 — Mechanics' Liens, 4 — Promissory Notes, 3, 6—Vendor and Purchaser, 2, 8, 12.

INTERPLEADER.

1. Application by Garnishees — Remedy under Rule 392—Attachment Proceedings before Judgment—Rules of Court — Discretion — Practice: Mears v. Arcola Wood Working Co. (Sask.), 840.

2. Application by Sheriff—Grounds for Refusing Relief — Sale of Goods Seized without Advertising — Prejudice to Claimant—Notice — Delay in Applying — Rules of Court — Payment of Part of Proceeds of Sale to Execution Creditors: Hogan v. Boozan (Sask.), 548.

3. Order Attaching Goods—Seizure under — Order Set aside—Withdrawal of Sheriff—Order Reinstated — Reseizure of Part of Goods — Judgment Subsequently Obtained—Proof of—Lapse of Issue—Form of Issue —Onus — Presumption — Judgment on Issue Limited to Goods Seized by Sheriff on Second Occasion: Turner v. Tymchorak (Man.), 484.

See Bankruptcy and Insolvency, 3 — Bills of Sale, 2—Equitable Assignment—Husband and Wife, 1—Master and Servant, 5—Sale of Goods, 5.

INTESTATE ESTATES ACT.

See Executors and Administrators, 5.

INTOXICATION.

See Vendor and Purchaser, 3.

JOINDER OF CAUSES OF ACTION.

See Trade Union, 3.

JOINDER OF PARTIES.

See Parties—Railway, 5.

JUDGMENT.

1. Summary Judgment — Money Demand —Action by Assignee of Claim—Defence — Set-off or Counterclaim against Assignor — King's Bench Act, sec. 39 (*f*) — Independent Cause of Action — Unliquidated Damages: McManus v. Wilson (Man.), 106.

2. Summary Judgment—Rule 103—Action for Instalment of Purchase Money of Land and Interest—Defence—Want of Title in Plaintiffs—Equitable Relief—Doubt as to Claim for Interest—Unconditional Leave to Defend: Graves v. Mason (Alta.), 265.

3. Summary Judgment—Rule 103—Action on Promissory Note—Affidavit in Support of Motion—Sufficiency—Presentment — Pleading — Defence of Fraud — Notice — Defence Available to all Defendants — Unconditional Leave to Defend: Alloway v. Pamranke (Sask.), 134.

4. Summary Judgment—Rule 103—Objections to Motion—Material Omission in Copy of Affidavit Served—Non-compliance with Rules of Court —Re-service and Amendment Allowed on Terms—Action for Same Cause Pending in District Court—Bar to Prosecution of Action in Supreme Court — Dismissal of Motion: Craftsmen Limited v. Hunter (Sask.), 435.

See Banks and Banking—Interpleader. 3,—Mortgage, 5, 7—Trade Union, 2 —Vendor and Purchaser, 16, 20.

JUDGMENT CREDITOR.

See Fraudulent Conveyance.

JUDGMENT DEBTOR.

See Attachment of Debts.

JUDICIAL NOTICE.

See Railway, 7.

JURISDICTION.

See Attachment of Goods—Company, 2, 4—Criminal Law, 5—Executors and Administrators, 3—Injunction, 2 — Justice of the Peace—Land Titles Act, 2—Landlord and Tenant, 5—Malicious Prosecution—Master and Servant, 6—Mines and Minerals, 1 —Mortgage, 7—Practice, 3—Railway, 7, 8.

JURY.

See Promissory Notes, 1—Railway, 4 —Sale of Goods, 2.

JURY ORDINANCE.

See Constitutional Law, 4.

JUSTICE OF THE PEACE.

Jurisdiction—Information — Conviction Territorial Jurisdiction — Presumption — Evidence: Rex v. Canadian Pacific R. W. Co. (Alta.), 825.

See Criminal Law, 5, 6—Malicious Prosecution—Master and Servant, 6 — Railway, 7, 8.

LACHES.

See Banks and Banking—Practice, 2 — Vendor and Purchaser, 1.

LAND TITLES ACT.

1. Application for Registration as Owner in Fee Simple—Continuous Possession for 12 Years—Statute of Limitations—Positive Title Acquired — Direction for Registration and Issue of Certificate of Title — Evidence of Possession — Affidavits — Starting Point for Statute — Evidence as to State of Title at Commencement of Possession—Necessity for: Re Anderton (Alta.), 319.

2. Certificate of Title—Mistake in Name —Correction—Summary Application —Jurisdiction: Re Smith (Sask.), 131.

3. Execution — Registration — Mortgage —Priorities—Certificate of Title — Ownership: Re Seaborn and Hansberger (Sask.), 71.

4. Sale by Order of Court in Action for Foreclosure — Reference to Sheriff to Sell—Order of Judge Confirming Sale Made — Inapplicability of sec. 132 of Act—Immediate Operation of Order—Duty of Registrar of Land Titles—Issue of Certificate of Title to Purchaser: Canadian Pacific R. W. Co. v. Mang (Sask.), 774.

See Mortgage, 1 — Vendor and Purchaser, 19.

LANDLORD AND TENANT.

1. Action for Rent—Surrender of Premises—Operation of Law—Acceptance — Delivery of Key—Subsequent Renting of Premises: Yukon Trust Co. v. Popich (Y.T.), 852.

2. Distress—Sub-lease—Rights of Lessee against Sub-lessee, where no Reversionary Interest Reserved — Reversion by Estoppel—Right of Entry—Payment of Rent — Injunction — Damages — Costs: O'Connor v. Peltier (Man.), 576.

3. Forfeiture of Lease—Relief against Forfeiture — Non-payment of Rent Excused by Oral Assurance—Authority of Landlady's Husband—Grounds against Relief—Mental Incompetence—Knowledge of Tenant—Evidence — Option to Purchase — Restoration with Lease: Huntting v. Macadam (B.C.), 214.

4. Lease — Special Clause—Defect in Building — Neglect of Landlord to Repair—Tenant Leaving Building—Liability for Rent—Distress—Excess —Damages — Tender — Amount of Rent Due: McDougall v. Kerr (Alta.), 528.

5. Overholding Tenant—Summary Proceeding to Recover Possession—Originating Summons — Jurisdiction of Local Judge — District Courts Act, sec. 42—Practice—Rule 469—Relationship of Landlord and Tenant—Agreement for Assignment of Reversion to Person Assuming to Proceed as Landlord—No Transfer of Title —Right of Tenant to Remain in Possession—Payment for Improvements —Option of Purchase: Porter v. Rooney (Alta.), 289.

See Municipal Corporations, 2.

LEASE.

See Landlord and Tenant—Vendor and Purchaser, 4.

LEGACY.

See Will, 2.

LEGISLATURE.

See Constitutional Law.

LETTERS OF ADMINISTRATION.

See Executors and Administrators, 1.

LIBEL.

See Defamation—Parties.

LICENSE.

See Liquor License Act—Sale of Goods, 3.

LIEN.

Woodmen's Lien for Wages Act, R. S. B. C. 1897 ch. 194, sec. 3—"Woodman" — Hire of Horses: Muller v. Shibley (B.C.), 42.

See Bankruptcy and Insolvency, 2—Carriers—Dominion Lands Act — Mechanics' Liens—Municipal Corporations, 2—Vendor and Purchaser, S. 10.

LIEN NOTES.

See Promissory Notes, 4.

LIMITATION OF ACTIONS.

Claim on Promissory Notes—Conditional Offers to Pay Money—Letter—Acknowledgment in Writing to Take Case out of Statute — Requisites: Deering Harvester Co. v. Black (Sask.), 91.

See Land Titles Act, 1—Mortgage, 6.

LIQUOR LICENSE ACT.

Renewal of License — Powers of License Commissioners—Appeal to County Court Judge — Petition under sec. 12 — Right of Appeal: Re Kernie Liquor Appeal (B.C.), 394.

LIS PENDENS.

See Mechanics' Liens, 4, 6.

LOCAL IMPROVEMENT ORDINANCE.

See Assessment and Taxes, 1.

LOCAL JUDGE.

See Landlord and Tenant, 5.

LOCAL REGISTRAR.

See Practice, 5.

MALICIOUS PROSECUTION.

Absence of Reasonable and Probable Cause for Prosecution — Commencement and Continuation of Prosecution—Malice — Findings of Trial Judge—Damages — Costs — Scale of — District Court Jurisdiction — Set-off — Justice of the Peace — Issue of Warrant in Lieu of Summons: Carruthers v. Beisiegel (Alta.), 255.

See Pleading.

MANDAMUS.

Claim against City Corporation for Money Due—Resolution of Council Authorizing Payment—Refusal of Mayor to Sign Cheque—Action by Claimants for Mandamus—Adequate Legal Remedy by Action against Corporation: Holmes v. Brown (Man.), 459.

MANSLAUGHTER.

See Criminal Law, 3.

MARRIAGE SETTLEMENT.

See Bills of Sale, 2.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

1. Dismissal of Servant—Attempted Justification—Disobedience of Orders—Finding of Fact—Review by Appellate Court—Wrongful Dismissal — Damages: Bewell v. Wheat City Flour Co. (Man.), 273.

2. Dismissal of Servant—Justification—Incompetency — Contract of Hiring — Provision Making Master Sole Judge—Exercise of Power of Dismissal for Cause and without Fraud or Caprice—Bonus: Aliman v. Yukon Consolidated Gold Fields Co. (Y.T.), 373.

3. Injury to and Death of Servant — Failure of Action at Common Law and under Employers Liability Act —Successful Claim under Workmen's Compensation Act—Costs — Provisions of sec. 2, sub-sec. 4—Deduction of Costs Incurred by Action being Brought instead of Proceeding under Act—Method of Application—Set-off — "Good Cause:" Follis v. Schaake Machine Works Limited (B. C.), 14.

4. Injury to Servant—Breach of Statutory Duty on Part of Railway Company—Improper Couplings—Contributory Negligence — Volens—Quantum of Damages: Roylance v. Canadian Pacific R. W. Co. (B.C.), 399.

5. Master and Servant Act, 1899—Employees of Mining Company—Appointment of Medical Practitioner—Proceedings under Statute—Meetings of Employees — Validity — Balloting — Notice Calling Meetings — Authority — Miners' Union—Medical Fund Claimed by Rival Practitioners — Interpleader — Assignments of Fund: Bonnell v. Hoggins (B.C.), 395.

6. Master and Servant Ordinance—Magistrates' Want of Jurisdiction, when Service Terminated—Farm Labourer —Menial Servant — Period of Service — Wages — Notice — Termination of Employment: Re Robert and Weir (Sask.), 69.

7. Wages—Contract — Proof — Credibility of Witnesses: Watt v. Watt (Sask.), 953.

See Trade Union.

MAYOR.

See Mandamus.

MECHANICS' LIENS.

1. Building Contract—Action to Enforce Liens—Payment in Full to Contractor—Prejudice to Existing Liens—Deduction of Damages for Delay—Evidence — Conflict of Testimony—Credibility of Party as Witness—Costs: Gorman v. Henderson (Alta.), 422.

2. Building Contract—Death of Contractor—Payments by Owners Directly to Mechanics — Payment of Full Amount of Contract Price—Limitation of Liability of Owner—Alberta Mechanics' Lien Act, secs. 19, 32—Time of Attachment of Lien—Payments to Contractor—Prejudice to Existing Liens—Costs: Ross Brothers Limited v. Gorman (Alta.), 413.

3. Building Contract—Extras—Enforcement of Lien — Time of Registering —Time when Last Work Done — Trifling Character of Work—Necessary Work—Delay for Defendant's Benefit — Personal Liability of Owner—Judgment: Clarke v. Moore and Galbraith (Alta.), 411.

4. Building Contract — Extras — Enforcement of Lien—Time of Registering—Time when Last Work Done — Trifling Character of Work — Work Done not Colourably, but in Good Faith—Time of Bringing Action and Registering Certificate of Lis Pendens—Computation of Time —Promissory Note Given for Part of Contract Price of Work—Negotiation by Lienor—Extinguishment of Lien pro Tanto—Agreement for Settlement of Claim—Waiver — Estoppel — Land Enjoyed with House —Quantity of—Interest — Improvements—Occupation Rent: Clarke v. Moore and Simpson (Alta.), 405.

5. Building Contract — Payment of Part of Contract Price to Contractor — Abandonment of Work by Contractor—Completion by Owner — Payments to Contractor—Prejudice of Existing Liens—Liability of Owner for Work Done or Material Supplied after Abandonment—Promise to Pay —Consideration—Time of Registering Lien—Material Supplied within 31 Days not Claimed for—Effect as to Material Previously Supplied: Union Lumber Co. v. Porter (Alta.), 423.

6. Lien for Materials—Time for Filing—Time of Supplying Last Material—"Ceased to Furnish Materials"—Interest in Goods Supplied—Certificate of Lis Pendens—Time of Filing —Error of Registrar—Entry in Day Book—Meaning of "Filing"—Taking Promissory Note—Effect on Lien —Sum Due from Owner to Contractor — Evidence — Onus: Gorman, Clancey, & Grindley v. Archibald, P. Anderson & Co. v. Archibald (Alta.), 916.

MEDICAL PRACTITIONER.

See Master and Servant, 5.

MERGER.

See Mortgage, 1.

MINES AND MINERALS.

1. Mineral Claims—Staking — Illegal Post — Grant to Locator under Age —Extension of Boundaries — Placer Mining Act, 1906, sec. 13—Grant by Gold Commissioner—Amendment —Note or Memorandum by Assistant Gold Commissioner — Status of Person Attacking Placer Grant — Parties — Attorney-General—Jurisdiction of Territorial Court—Adverse Right—Dominion Lands Act — Title —Purchaser for Value without Notice — Re-location: McDougall v. Johansen (Y.T.), 955.

2. Water Grants—Construction of Ditch by Plaintiffs—Hydraulicing Placer Mining Claims—Location of Ditch—Plans and Surveys — Ditch Crossing Defendant's Claim—Trespass — Destruction of Flume—Waste of Water —Representation Work — Right of Grantee to Attack Grant to another —Rights of Defendant as Prior Locatee—Crown Regulations—Evidence —Injunction — Damages: Yukon Consolidated Gold Fields Co. v. Schmidt (Y.T.), 708.

See Contract, 7—Master and Servant, 3 —Mortgage, 4—Solicitor, 4—Trade Union, 3.

MISDIRECTION.

See Criminal Law, 8—Promissory Notes, 1.

MISREPRESENTATIONS.

See Fraud and Misrepresentation — Partnership, 1, 2—Promissory Notes, 1, 3, 5—Sale of Goods—Vendor and Purchaser, 5, 6, 10, 11, 21, 22, 26.

MISTAKE.

See Land Titles Act, 2—Municipal Corporations, 1.

MONEY IN COURT.

See Costs, 6.

MONEY LENDERS ACT.

See Criminal Law, 9.

MORTGAGE.

1. Action for Foreclosure—Land Titles Act—Transfer of Land—Certificate of Title — Memorandum Indorsed on —Merger or Extinguishment of Mortgage Assigned to Transferee — Priority — Covenant: Reeves v. Konschur (Sask.), 346.

2. Foreclosure — Defence — Extension of Time for Payment of Instalment — Agreement — Consideration — Oral Contract—Evidence: Gilroy v. Proe (Sask.), 81, 777.

3. Foreclosure or Sale—Originating Summons—Defendant not Appearing — Discretion of Judge—Right to Order Sale—Rule 452: Excelsior Life Insurance Co. v. Prestniak (Sask.), 780.

4. Interest in Mining Claims—Representation Work—Redemption — Tender before Action — Refusal — Deed of Reconveyance — Conditional Tender —Readiness to Implement Tender—Pleading — Costs — Counterclaim—Amendment — Foreclosure—Appeal Book — Preparation — Mistakes: Hammond v. Strong (Y.T.), 362.

5. Judgment for Sale of Land—Sale under Direction of Clerk of Court — Invalidity — Refusal of Motion to Confirm — Necessity for Approbation of Judge — Conditions of Sale —Advertisements—Consent of Prior Incumbrancer — Reserved Bid — Conduct of Sale—Leave to Bid—Description of Land—Title — Costs: Cummings v. Semerad (Alta.), 644.

6. Sale by Mortgagees under Power — Action by Mortgagor to Redeem — Possession — Legal Estate—Notice of Sale—Limitation of Actions — Real Property Limitation Act: Campbell v. Imperial Loan Co. (Man.), 502.

7. Sale under Judgment—Sale Subject to Prior Mortgage — Confirmation — Invalidity of Registered Executions —Homestead Exemption—Originating Summons—Jurisdiction — Declaration of Invalidity—Status of Execution Creditors: Union Bank v. Jordon (Sask.), 77.

See Costs, 5—Discovery, 3—Dominion Lands Act—Land Titles Act, 3, 4—Vendor and Purchaser, 13.

MUNICIPAL CORPORATIONS.

1. Contract to Transfer Lands of Corporation — Contract under Seal of Corporation and Signatures of Mayor and Secretary-Treasurer—Proof of Authority—Proceedings of Council not Entered on Minutes — Proof of, by Oral Testimony—Absence of Resolution — Necessity for By-law — Property Acquired by Gift—Enforcing Contract—Mistake—Specific Performance — Damages: Milestone v. City of Moose Jaw (Sask.), 901.

2. Ownership of Electric Light Works—Light Supplied to House—Remedy for Non-payment — Lien—Enforcement against Landlord on Tenant's Default: Stennett v. City of Edmonton (Alta.), 62.

See Assessment and Taxes—Contract, 8 —Highway — Mandamus — Prairie Fire Ordinance—Railway, 1.

MUNICIPAL ELECTIONS.

1. Councillors for Village—Alberta Village Act, 1907—Villages already Organized—Application of Act — Resignation of Candidate—No Power to Withdraw—Void Election: Re Stoney Plain Municipal Election (Alta.), 54.

2. Election of Councillor — Qualification of Voters — Payment of Taxes — Declaration of Voter: Rex ex rel. Tobey v. McDonald (Sask.), 83.

MURDER.

See Criminal Law, 3.

NAME.

See Land Titles Act, 2.

NATURALIZATION ACT.

See Aliens.

NEGLIGENCE.

1. Bailment — Perishable Goods — Injury to, by Negligence of Bailees—Defective Storage Plant—Improper Operation — Warehouse Receipts — Stipulation as to Liability — Defects in Wrappers: Charrest v. Manitoba Cold Storage Co. (Man.), 110.

2. Injury to and Death of Person Taking Sand from Sand Pit—Falling in of Roof of Pit—Liability of Owner of Pit — Knowledge of Danger — Warnings — Fault of Deceased: Roy v. Henderson (Man.), 151.

See Bailment—Master and Servant, 4—Railway, 2, 4, 5—Solicitor, 4.

NEW TRIAL.

Action for Defamation—Verdict for Defendants — Perverse Verdict—Nominal Damages: Green v. World Printing and Publishing Co. (B.C.), 210.

See Criminal Law, 2, 8.

NEWSPAPER.

See Defamation, 1.

NEXT FRIEND.

See Executors and Administrators, 1.

NONSUIT.

See Solicitor, 4.

NOTICE.

See Assessment and Taxes, 1—Husband and Wife, 1—Interpleader, 2—Judgment, 3—Master and Servant, 6—Mines and Minerals, 1—Promissory Notes, 1, 5—Railway, 7—Sale of Goods, 6.

NOTICE OF MOTION.

See Vendor and Purchaser, 16.

NOTICE OF SALE.

See Mortgage, 6.

NOTICE OF TRIAL.

Regularity — Action Transferred to Supreme Court from County Court—Order Transferring — Time of Taking Effect — Filing—Entry — Service: Parrat v. Cheales (B.C.), 404.

NOVATION.

See Contract, 3.

NUISANCE.

Smoke—Damages — Injunction — Evidence: Smith v. Consolidated Mining and Smelting Co. of Canada (B.C.), 47.

OCCUPATION RENT.

See Mechanics' Liens, 4—Vendor and Purchaser, 19.

OFFICIAL ADMINISTRATOR.

See Executors and Administrators, 5.

OPTION.

See Landlord and Tenant, 3, 5—Vendor and Purchaser, 12, 22.

ORDER IN COUNCIL.

See Constitutional Law, 3.

ORIGINATING SUMMONS.

See Distribution of Estates—Executors and Administrators, 4—Landlord and Tenant, 5—Mortgage, 3, 7.

OVERHOLDING TENANT.

See Landlord and Tenant, 5.

PARENT AND CHILD.

See Will, 2.

PARLIAMENT.

See Constitutional Law.

PARTIES.

Joinder of Defendants—Separate Causes of Action—Libel — Leave to Amend by Alleging Joint Cause of Action—Pleading — Election: Equity Fire Insurance Co. v. Coulthard-Alexander Co., Anglo-American Fire Insurance Co. v. Coulthard-Alexander Co. (Sask.), 74.

See Attachment of Debts, 5—Banks and Banking — Costs, 7 — Covenant — Fraud and Misrepresentation, 2—Injunction, 1—Mines and Minerals, 1 —Railway, 5—Trade Union, 3.

PARTNERSHIP.

1. Dissolution — Action for — Misrepresentations as to Value—Fraud — Evidence — Counterclaim — Costs: Swanson v. Grahame (B.C.), 48.

2. Dissolution — Fraudulent Misrepresentations — Damages —Evidence— —Forfeiture — Waiver — Contract — Counterclaim — Costs: Swanson v. Grahame (B.C.), 982.

See Attachment of Debts, 2, 3.

PASSENGER.

See Railway, 5.

PATENT FOR LAND.

See Assessment and Taxes, 2—Dominion Lands Act.

PAYMENT.

See Mechanics' Liens, 2, 5—Promissory Notes, 4.

PAYMENT INTO COURT.

See Costs, 6.

PENALTY.

See Prairie Fire Ordinance—Ship, 3.

PERSONA DESIGNATA.

See Railway, 6.

PICKETTING.

See Trade Union, 2.

PLACER MINING ACT.

See Mines and Minerals, 1.

PLANS AND SURVEYS.

See Mines and Minerals, 2.

PLEADING.

Statement of Claim—Disclosure of Cause of Action — Malicious Prosecution— Charge not Known to Law—Facts Pleaded to Shew Malice—Absence of Prayer or Claim — Amendment — Costs: Flora v. Shandro (Alta.), 426.

See Defamation, 2—Easement—Injunction, 1—Judgment, 3—Mortgage, 4—Parties — Railway, 3, 4 — Sale of Goods, 9—Service out of Jurisdiction —Vendor and Purchaser, 4.

PLEDGE.

See Bankruptcy and Insolvency, 4.

POSTPONEMENT OF TRIAL.

See Evidence, 3—Practice, 2, 6.

PRACTICE.

1. Chambers Summons — Irregularity— Omission of Name and Address of Solicitor Issuing Summons—Irregularity — Amendment—Costs: Beaver Lumber Co. v. Eckstein (Sask.), 439.

2. Dismissal of Action—Failure of Plaintiff to Proceed at Trial—Refusal of Application to Postpone—Plaintiff Appearing by Counsel—Rule 255 —Appeal to Court en Banc—Right of Appeal — Application to Trial Judge to Re-open Case — Enlargement of Time for—Rule 548—Legal Holiday — Delay: Burke v. Nolin (Sask.), 830.

3. Service of Papers — Statement of Claim — Substituted Service—Rule 201—Personal Service on Foreigners in Jurisdiction—Affidavits — Admission of Solicitor—Defendants out of Jurisdiction—Domicile or Residence —Temporary Residence in Jurisdiction—Rule 183—Service out of Jurisdiction: Emperor of Russia v. Prospouriakoff (Man.), 10.

4. Summons for Directions—Order XXX. —Venue Fixed by Order Giving Directions—Subsequent Application to Change Venue—Power of Judge to Vary Previous Order: Foss v. Hill (B.C.), 224.

5. Writ of Summons — Irregularity— Writ signed by Clerk of Court instead of Local Registrar—Motion to Set aside Service of Writ—Grounds: Crown Lumber Co. v. Fitzsimmons (Sask.), 544.

6. Writ of Summons—Issue from Wrong Division — Irregularity — Appearance—Waiver—Rule 546—Transfer to Proper Division—Venue—Change of — Preponderance of Convenience and Expense — Postponement of Trial: Doody v. Bigelow (Y.T.), 978.

7. Writ of Summons—Service on Foreign Company—Service on Ordinary Agent in Jurisdiction — Validity where Attorney Appointed under Foreign Companies Ordinance—Rules of Court — Repugnancy; Jones v. Central Canada Insurance Co. (Sask.), 614.

See Appeal—Arbitration and Award—Attachment of Debts—Attachment of Goods — Company, 2—Costs—County Courts—Criminal Law, 6, 7 — Discovery — Distribution of Estates—Evidence—Executors and Administrators, 3, 4—Injunction—Interpleader—Judgment—Land Titles Act, 2—Landlord and Tenant, 5—Mortgage, 3, 4, 5—Notice of Trial—Parties — Pleading—Service out of Jurisdiction — Ship, 2—Solicitor—Trade Union, 2—Vendor and Purchaser, 3, 16.

PRAIRIE FIRE ORDINANCE.

Conviction—Appeal after Plea of "Guilty"—Application of Ordinance in Incorporated Town—Offence — Evidence — Amount of Penalty on a First Conviction—Amendment—Reduction: Rex v. Baird (Sask.), 65.

PREFERENCE.

See Fraudulent Conveyance — Service out of Jurisdiction.

PRESCRIPTION.

See Easement.

PRESENTMENT.

See County Courts—Judgment, 3—Promissory Notes, 4, 6.

PRESUMPTION.

See Bankruptcy and Insolvency, 2.

PRINCIPAL AND AGENT.

1. Agent's Commission on Sale of Land —Contract — Construction—"Right to Commission" — Pending Sales—Termination of Agency: Buckworth v. Nelson and Fort Sheppard R. W. Co. (B.C.), 43.

2. Agent's Commission on Sale of Land —Contract to Pay Commission—Construction — "Completion of the said Sale"—Execution of Binding Agreement—Sale not Carried out: Haffner v. Cordingley (Man.), 743.

3. Agent's Commission on Sale of Land —Contract to Pay Commission—Vendor and Purchaser Brought together by Agent's Procurement—Evidence: Elvin v. Clough (Man.), 590.

4. Agent's Commission on Sale of Land — Contract to Pay Commission — Vendor and Purchaser Brought together by Agent's Procurement—Evidence—Remuneration of Agent—Quantum Meruit: Bent v. Arrowhead Lumber Co. (Man.), 594.

5. Agent's Commission on Sale of Land — Employment of Agent to Find Purchaser at Named Figure—Introduction of Purchaser — Subsequent Sale at Lower Figure: Brigman v. Hepburn (B.C.), 28.

6. Agent's Commission on Sale of Land —Purchaser not Found by Agent—Contract for Payment of Commission—Sale Effected at Lower Price —Assistance in Closing Sale—Remuneration — Quantum Meruit: Munroe v. Beischel (Sask.), 63[illegible].

7. Agent's Commission on Sale of Land —Services Rendered in Procuring Purchaser—Purchaser not Found by Agent—Negotiations with Purchaser —Quantum Meruit — Implied Contract to Pay for Services: Thomson v. Milling (Sask.), 622.

See Contract, 4—Husband and Wife —Trade Union, 3—Vendor and Purchaser, 5, 7.

PRISON.

See Criminal Law, 4.

PRIVILEGE.

See Defamation, 1—Discovery, 3.

PROCURING OFFENCE.

See Criminal Law, 2.

PRODUCTION OF DOCUMENTS.

See Discovery, 3—Evidence, 1.

PROMISSORY NOTES.

1. Consideration — Fraudulent Representations—Transfer of Notes—Defective Title—Notice or Knowledge of Transferee—Evidence—Notes of Similar Character Taken by Defendant—Admissibility — Jury—Misdirection — Intent — Holder in Due

Course — Bills of Exchange Act—Onus—Credibility of Witnesses: Olstadt v. Lineham (Alta.), 152.

2. Default in Payment at 3 o'clock on Last Day of Grace—Seizure under Chattel Mortgage Later on Same Day — Bills of Exchange Act, sec. 121 (b)—Premature Seizure—Damages — Eviction: Westaway v. Stewart (Sask.), 907.

3. Failure of Consideration — Purchase Price of Horse — Division into Shares—Necessary Number of Subscribers not Obtained — Non-fulfilment of Agreement—Transferee of Note—Holder in Due Course—Fraud —Interest Overdue at Time of Transfer — Notice of Defects in Transferor's Title — Suspicious Circumstances: Peters v. Perras (Alta.), 162.

4. Indorsement by Debtor to Creditor—Question whether as Payment or Security—Evidence — Presentment—Waiver—Collateral Security—Lien Notes—Property not Passing: Foster v. Woodworth (Sask.), 688.

5. Indorsement for Limited Purpose—Failure of Purpose—Fraudulent Use by Maker for another Purpose—Holders in Due Course — Notice—Knowledge: Stirton v. Harvey (Man.), 185.

6. No Place of Payment Mentioned—No Necessity for Presentment — Action by Foreign Company not Registered under Foreign Companies Ordinance —Note Given in Payment for Shares —"Contract Made in Connection with Business Carried on"—Note Indorsed by Plaintiffs, Payees, in Blank—No Surrender—Interest in Note—Status of Plaintiffs: Canadian Co-operative Co. v. Trauniczek (Sask.), 550.

7. Price of Machine—Failure of Consideration — Evidence—Corroboration —Infant—Sale of Machine to—Retention of Machine after Majority—Ratification of Contract — Onus: Great West Implement Co. v. Grams (Alta.), 160.

See Attachment of Debts, 2, 7—Bankruptcy and Insolvency, 2 — Banks and Banking—County Courts—Judgment, 3 — Limitation of Actions—Mechanics' Liens, 4, 6.

PROSTITUTE.

See Criminal Law, 11, 12.

QUALIFICATION OF VOTERS.

See Municipal Elections, 2.

QUANTUM MERUIT.

See Principal and Agent.

RAILWAY.

1. Agreement with Municipality — Confirmation by Statute—By-law—Permission to Alter Grade of Streets and Construct Subway — Injury to Land Fronting on Streets—Injunction—Construction of Agreement—Work Done in Accordance with Agreement: Fraser v. Canadian Pacific R. W. Co. (Man.), 380.

2. Carriage of Goods—Injury to Goods Carried — Negligence — Condition Limiting Liability — Approval of Board of Railway Commissioners: Mason and Risch Piano Co. v. Canadian Pacific R. W. Co. (Sask.), 951.

3. Duty of Railway Company to Fence—Breach of Statutory Duty—Railway Act, 1903, secs. 199, 294—Railway Act, R. S. C. 1906 ch. 37, secs. 254, 427—Right to Damages—Fence Ordinance — Pleading — "Not Guilty by Statute:" Winterburn Farm Co. v. Edmonton, Yukon, and Pacific R. W. Co. (Alta.), 815.

4. Injury to and Death of Engine-driver —Negligence—Post too Near Track —Evidence that Post since Removed —Admissibility—Judge's Charge—Evidence Establishing Negligence—Duty of Trial Judge to Submit Questions to Jury—Damages—Functions of Jury—Quantum of Damages —Pleading — "Not Guilty by Statute:" Toll v. Canadian Pacific R. W. Co. (Alta.), 795.

5. Injury to Passenger at Station—Unsafe Condition of Platform—Negligence — Contributory Negligence—Evidence—Damages—Husband and Wife—Injury to Wife — Claim of Husband for Loss of Services of Wife — Joinder of Plaintiffs and Causes of Action—Quantum of Damages: Swan v. Canadian Northern R. W. Co. (Alta.), 662.

6. Lands Required for—Offer of Price—Acceptance—Time—No Necessity for Arbitration—Res Judicata—Persona Designata: Bennetto v. Canadian Pacific R. W. Co. (Man.), 157.

7. Order of Board of Railway Commissioners—Establishment and Maintenance of Fireguard — Conviction of Railway Company for Neglecting—Non-publication of Order in Canada Gazette — No Proof of Notice to Railway Company — Objection not Taken before Magistrate—Jurisdiction — Conviction Contrary to Natural Justice—Certiorari—Motion to Quash—Evidence—Requirements of Fireguard — Prairie Country—Absence of Proof of — Amendment—Legislative Authority of Parliament —Proof that Railway Operated by Steam—Judicial Notice—Duplicate Offence: Rex v. Canadian Northern R. W. Co. (Sask.), 889.

8. Order of Board of Railway Commissioners—Establishment and Maintenance of Fireguard — Conviction of Railway Company for Neglecting—Justice of the Peace — Jurisdiction —Evidence — Proof of Order of Board—Seal—Prairie Country—Absence of Proof of — Certiorari—Quashing Convictions: Rex v. Canadian Pacific R. W. Co. (Sask.), 899.

9. Taking Gravel from Land Adjoining Right of Way—Trespass—Maintenance of Road — Railway Acts — Rights of Homesteader — Dominion Lands Act — Damages — Spur Line Built across Land: Smyth v. Canadian Pacific R. W .Co. (Sask.), 700.

See Costs, 2, 4—Master and Servant, 4.

RAPE.

See Criminal Law, 8.

RATIFICATION.

See Promissory Notes, 7—Vendor and Purchaser, 3.

REAL PROPERTY LIMITATION ACT.

See Mortgage, 6.

REASONABLE AND PROBABLE CAUSE.

See Malicious Prosecution.

RECEIVER.

See Equitable Assignment.

RECTIFICATION OF CONTRACT.

See Vendor and Purchaser, 11, 25.

REDEMPTION.

See Mortgage, 4, 6.

REFERENCE.

See Distribution of Estates.

REGISTRY LAWS.

See Fraud and Misrepresentation, 2—Highway—Land Titles Act.

RELEASE.

See Contract, 3—Vendor and Purchaser, 10.

RELIEF AGAINST FORFEITURE.

See Landlord and Tenant, 3—Vendor and Purchaser, 15, 18, 20.

RENEWAL OF LICENSE.

See Liquor License Act.

RENT.

See Landlord and Tenant, 1, 2, 4.

RESCISSION OF CONTRACT.

See Sale of Goods—Vendor and Purchaser.

RES JUDICATA.

See Railway, 6.

RESERVE FUND.

See Company, 1.

RESIDENCE.

See Practice, 3.

RESOLUTION OF COUNCIL.

See Mandamus.

RESTRAINT OF TRADE.

See Covenant.

REVERSION.

See Landlord and Tenant, 2, 5.

REVOCATION OF PROBATE.

See Will, 1.

ROAD.

See Highway.

SALE OF CROPS.

See Emblements.

SALE OF GAS.

See Contract, 2.

SALE OF GOODS.

1. Acceptance — Subsequent Attempted Repudiation—Misrepresentation as to Condition — Rescission of Contract — Condition — Warranty, Express or Implied—Evidence—Sale of Goods Ordinance: Robertson v. Morris (Alta.), 611.

2. Action for Price — Express Warranty —Implied Condition as to Fitness—Breach — Evidence — Findings of Jury — Counterclaim: North-West Thresher Co. v. Andrews (Alta.), 827.

3. Action for Price—Late Delivery — Inferiority—Counterclaim— Amount Overpaid — Extra-provincial Company — Incorporation by Dominion Act — Doing Business in Province without License — British Columbia Companies Act, sec. 123 — Intra Vires — Constitutional Law: Waterous Engine Works Co. v. Okanagan Lumber Co. (B.C.), 278.

4. Conditional Sale—Payment by Instalments — Default—Seizure of Goods by Vendor — Acknowledgment by Purchaser of Amount Due—Chattel Mortgage by Purchaser to Vendor of Same Goods—Agreement of Vendor—Failure to Put Purchaser in Possession of Goods—Sale by Vendor—Dismissal of Action for Balance Due—Costs: Jones v. Okada (Y.T.), 557.

5. Conditional Sale—Property not Passing to Vendee—Possession Given to Vendee—Seizure under Execution against Vendee—Claim by Unpaid Vendors — Interpleader — Evidence — Order for Goods — Proof of Signature by Vendee—Proof of Delivery of Goods—Goods Transferred from Manitoba to Saskatchewan — Identity of Goods Seized with those Purchased—Order for Sale not Registered in Saskatchewan — Sale Made in Manitoba—Manitoba Law: Sawyer-Massey Co. v. Boyce (Sask.), 834.

6. Conditional Sale—Repossession and Resale by Vendor — Action for Deficiency in Price Realized—Ordinance respecting Hire Receipts and Conditional Sales, sec. 8—Exercise of Power of Resale — Failure to Serve Notice on Purchaser Personally — Resale without Reserve and at Undervalue—Suspicious Circumstances: Vanstone v. Scott (Alta.), 919.

7. Contract — Statute of Frauds—Sales of Goods Ordinance—Acceptance and Receipt of Part—Oral Evidence — Admissibility — Entire Contract — Refusal to Accept Part—Damages—Failure to Prove Actual Loss — Nominal Damages — Counterclaim — Extra-provincial Company— Foreign Companies Ordinance, sec. 10—Exceptional Dealing—Rent of Land to Store Lumber—Nominal Sum Allowed — Costs: Tait and Sutherland v. Gibson Lumber Co. (Sask.), 350.

8. Machinery — Express Warranty—Implied Condition as to Fitness for Particular Purpose — Non-fulfilment — Right of Purchaser to Reject—Evidence—Oral Representation by Agent of Vendor—Admissibility—Onus — Right to Reject under Terms of Contract—Reasonable Time — Payment of Expenses—Authority of Decided Case — Supreme Court of North-West Territories: Reeves & Co. v. Chase (Alta.), 313.

9. Perishable Goods — Action for Price —Contract—Place where Property Passed—Place of Delivery — Pleading—Delivery to Carrier — Sale by Sample — Place for Inspection — Right of Rejection — Reasonable Time for Rejection — Retention and Resale of Part—Sales of Goods Act — Counterclaim—Damages—Breach of Warranty: Whitman Fish Co. v. Winnipeg Fish Co. (Man.), 488.

10. Specific Article—Knowledge of Purpose — Representation of Fitness—Warranty — Evidence — Repairs—Liability for Payment — Counterclaim — Breach of Warranty—Damages: Hutchison v. Johnston (B.C.), 251.

11. Specific Articles to be Manufactured —Refusal of Purchaser to Accept—Justification for — Rescission of Contract: Hyde v. Reid (Sask.), 555.

12. Warranty—Representation of Soundness of Animal Sold—Request for and Refusal of "Guarantee" — Evidence — Reliance on Representation: Taylor v. Poirier (Sask.), 949.

See Bills of Sale—Chattel Mortgage — Contract, 5, 6—Husband and Wife, 2—Promissory Notes, 3, 7.

SALE OF LAND.

See Costs, 1—Executors and Administrators, 5—Fraud and Misrepresentation, 1, 2—Mortgage, 3, 5, 6, 7—Land Titles Act, 4—Principal and Agent — Vendor and Purchaser.

SCALE OF COSTS.

See Costs, 6—Defamation, 1—Malicious Prosecution.

SEAL.

See Contract, 8—Criminal Law, 5—Executors and Administrators, 2 — Municipal Corporations, 1—Railway, 8—Vendor and Purchaser, 21.

SECRET PROFITS.

See Contract, 4.

SECURITIES.

See Bankruptcy and Insolvency, 4 — Banks and Banking—Bills of Sale.

SECURITY FOR COSTS.

See Costs, 7, 8.

SEPARATE ESTATE.

See Husband and Wife, 1.

SERVICE OF PAPERS.

See Attachment of Goods—Judgment, 4 —Notice of Trial — Practice, 3, 5, 7 — Solicitor, 1 — Vendor and Purchaser, 16.

SERVICE OUT OF JURISDICTION.

Statement of Claim — Rule 201 (c)— "Action Founded on any Tort Committed within Manitoba"—Preference — Chattel Mortgage—Assignments Act — Statute of Elizabeth: Anchor Elevator Co. v. Heney (Man.), 735.

See Practice, 3, 7.

SET-OFF.

See Judgment, 1—Master and Servant, 3—Malicious Prosecution — Vendor and Purchaser, 18.

SETTLEMENT.

See Banks and Banking.

SETTLEMENT OF ACTION.

See Costs, 9.

SHARES.

See Promissory Notes, 6.

SHERIFF.

See Interpleader, 2, 3—Land Titles Act, 4.

SHIP.

1. Collision—Evidence as to Fault — Position of Light—Finding of Fact: Kdjr v. The "Spray" (Ex. C. of Can.), 46.

2. Collision — Overtaking Vessel—Cause of Collision — Signals — Look-out —Rules of Navigation—"Keep out of the Way"—"Narrow Channels" —"Safe and Practicable"—Usage or Custom of Vessels — Evidence — Credibility of Witness — Erasures and Interlineations in "Scrap Log" —Expert Evidence—Practice of Admiralty Court—Assessors: Bryce v. Canadian Pacific R. W. Co. (B.C.), 230.

3. Seizure and Condemnation — Illegal Sealing—Behring Sea Award Act, 1894—Evidence of Offence—Onus — Failure to make Entries in Official Log — Penalty — Seizure by United States Revenue Cutter—"Duly Commissioned and Instructed"—Irregularities — Regular Proceedings in Court — Forfeiture of Ship—Release on Payment of Fine: Rex v. The "Carlotta G. Cox" (Ex. C. of Can.), 124.

SLANDER.

See Defamation, 2.

SOLICITOR.

1. Bill of Costs—Delivery of—Application by Client for Taxation—Substituted Service on Solicitor—Practice: Re Reid (Man.), 393.

2. Bill of Costs—Taxation — Review — Necessity for Filing Objections — Rules of Court — Leave to File Objections after Issue of Allocatur of Taxing Master: Re Solicitor, Ex p. Day and Henwood (Alta.), 533.

3. Bill of Costs—Taxation — Tariff of Costs—Conclusiveness on Taxation between Solicitor and Client as to Charges for Services Covered by Tariff — Rules of Court—Items of Bill Objected to — Counsel Fees — "Retainer" Fee — Special Retainer of Counsel — Fee not Paid in Cash —Advising on Evidence—Other Fees —Charges not Prescribed by Tariff—Fiat for Counsel Fees Granted ex Parte—Effect of—Appeal from Taxation: Re Solicitor, Ex p. Day and Henwood (Alta.), 536.

4. Negligence — Instructions to Proceed under Workmen's Compensation Act —Failure to Observe Requirements of Act—Action against Solicitor — Nonsuit because no Damage Shewn — Plaintiff Injured in Mine not Owned by his Employers—"Undertakers"—No Remedy Available — "Owners"—Burden of Proof: Scott v. McCarter (B.C.), 228.

See Company, 1, 2—Costs, 2, 9—Distribution of Estates—Executors and Administrators, 3—Injunction, 2—Practice, 1, 3.

SPECIFIC PERFORMANCE.

See Costs, 1—Municipal Corporations, 1 —Vendor and Purchaser.

STATEMENT OF CLAIM.

See Service out of Jurisdiction.

STATUTE OF FRAUDS.

See Contract, 3—Sale of Goods, 7 — Vendor and Purchaser, 3, 7, 9, 11, 25.

STATUTE OF LIMITATIONS.

See Land Titles Act, 1—Limitation of Actions—Mortgage, 6.

STATUTES.

See Aliens—Assessment and Taxes, 1—Costs, 3—Criminal Law, 12—Dominion Lands Act—Husband and Wife 1—Land Titles Act—Master and Servant, 5, 6—Railway, 1, 3.

STENOGRAPHER.

See Criminal Law, 5.

STRIKE.

See Trade Union, 2.

SUBSTITUTED SERVICE.

See Practice, 3—Solicitor, 1.

SUBSTITUTION OF DEBTOR.

See Contract, 3.

SUBWAY.

See Railway, 1.

SUMMARY APPLICATION.

See Land Titles Act, 2.

SUMMARY JUDGMENT.

See Judgment.

SUMMARY PROCEEDING.

See Landlord and Tenant, 5.

SUMMARY TRIAL.

See Criminal Law 7.

SUPREME COURT OF NORTH-WEST TERRITORIES.

See Sale of Goods, 8.

SURRENDER.

See Landlord and Tenant, 1—Promissory Notes, 6.

TARIFF OF COSTS.

See Costs, 2.

TAX SALE.

See Assessment and Taxes, 2.

TAXATION OF COSTS.

See Costs, 2, 5, 10—Solicitor, 1, 2, 3.

TENDER.

See Contract, 6, 7—Landlord and Tenant, 4—Mortgage, 4.

THREATS.

See Trade Union, 2.

TIMBER.

See Assessment and Taxes, 1.

TIME.

See Appeal—Assessment and Taxes 1—Carriers — Contract, 6, 7—Covenant — Equitable Assignment—Mechanics' Liens, 2-6—Mortgage, 2 — Notice of Trial—Practice, 2—Railway, 6—Sale of Goods, 8, 9—Vendor and Purchaser, 3, 15, 18.

TORT.

See Attachment of Goods—Trade Union, 1.

TRADE NAME.

See Discovery, 2.

TRADE UNION.

1. Interference between Master and Servant—Procuring Discharge of Servant—Actionable Tort—Damages — Injunction: Graham v. Bricklayers and Masons' Union (B.C.), 281.

2. Strike—Unlawful Acts — Inducing Workmen to leave or to Abstain from Entering Employment—Conspiracy — Besetting Works of Employers—Picketting — Violence — Threats — Injunction—Local Union — Interlocutory Judgment — Practice — Individual Defendants Representing Union—Destruction of Minute Books—Presumption—Damages — Property of Union: Cotter v. Osborne (Man.), 451.

3. Unincorporated and Unregistered Association — Action by — Status as Plaintiff — Individual Members — Breaches of Contracts—Joinder of Causes of Action — Parties — Individual Rights—Master and Servant—Agreements to Mine Coal — Terms and Conditions—Stipulations as to Timber, Water, and Track — Reasonable Interpretation — Industrial Disputes Act, 1907—Conciliation Boards—Agency: United Mine Workers of America District No. 18 v. Strathcona Coal Co. (Alta.), 649.

See Master and Servant, 5.

TRANSFER OF ACTION.

See Notice of Trial.

TRANSFER OF LAND.

See Fraud and Misrepresentation, 2—Mortgage, 1 — Municipal Corporations, 1.

TREATY.

See Constitutional Law, 2.

TRESPASS.

See Mines and Minerals, 2—Railway, 9.

TRIAL.

See Criminal Law—Evidence, 3—New Trial—Notice of Trial—Practice, 2, 4, 6.

TRUSTS AND TRUSTEES.

See Banks and Banking—Fraud and Misrepresentation, 2.

UNDERTAKING.

See Injunction, 2.

USURY.

See Criminal Law, 9.

VAGRANCY.

See Criminal Law, 10, 11, 12.

VENDOR AND PURCHASER.

1. Contract for Sale of Land—Action for Specific Performance—Delay of Purchaser — Abandonment: Battell v. Hudson's Bay Co. (Sask.), 700.

2. Contract for Sale of Land—Action for Specific Performance—Duress—Evidence — Interest — Reference as to Title: Tirschmann v. Schulz (Man.), 210.

3. Contract for Sale of Land—Action by Purchaser for Specific Performance or Damages—Re-sale by Vendor—Defences — Statute of Frauds—Intoxication—Ratification — Election of Plaintiff for Remedy by Damages—Measure of Damages—Price of Resale—Rising Market—Contemplation of Parties—Time at which Damages to be Estimated—Time of Actual Breach — Cross-Appeal — Increase of Damages: Dunn v. Callaghan (Alta.), 169.

4. Contract for Sale of Land—Action by Purchaser for Specific Performance—Acceptance of Lease by Purchaser from Vendor—Estoppel — Pleading: Poliquin v. St. Boniface (Man.), 561.

5. Contract for Sale of Land—Action by Vendor for Specific Performance — Defence—Misrepresentation of Vendor's Agent as to Situation of Land —Evidence — Commission Paid to Agent by Vendor—Agent Becoming one of the Purchasers: Cairns v. Crawford (Man.), 449.

6. Contract for Sale of Land—Action by Vendors for Specific Performance—Defence of Fraud — Misrepresentations as to Quality and Value of Land — Caveat Emptor—Appeal — Findings of Fact: Hannah v. Graham (Man.), 271.

7. Contract for Sale of Land—Authority of Agent of Vendor to Sell—Statute of Frauds — Receipt — Specific Performance: Harris v. Darroch (Sask.), 86.

8. Contract for Sale of Land—Failure of Vendor to Make Title to Part — Repudiation by Purchaser — Letters —Right to Rescind—Lien for Purchase Money Paid — Interest — Specific Performance — Costs: Bannerman v. Green (Sask.), 441.

9. Contract for Sale of Land—Failure of Vendors to Procure Title—Statute of Frauds—Memorandum in Writing —Purchaser's Damages for Loss of Bargain — Measure of Damages: O'Neil v. Drinkle (Sask.), 937.

10. Contract for Sale of Land—Lien for Unpaid Purchase Money—Cancellation of Contract—Release of Purchasers — Agreement — Delivery — —Escrow—Fraud and Misrepresentation—Appeal—Question of Fact: Huggard v. Ontario and Saskatchewan Land Corporation (Sask.), 866.

11. Contract for Sale of Land—Misrepresentations by Vendor as to Building on Land—Statute of Frauds—Oral Evidence — Damages — Rectification of Contract — Description — Specific Performance—Costs: Elleman v. Carruthers (Sask.), 692.

12. Contract for Sale of Land—Option and Acceptance—Provision for Formal Agreement—No Formal Agreement Executed—Action by Vendor for Instalment of Purchase Money—Action Maintainable — Waiver of Right to Formal Agreement—Interest — Delay — Default in Making Title—Possession—Vacant Lands—Costs: Munroe v. Henbach (Man.), 785.

13. Contract for Sale of Land—Payment of Purchase Money by Instalments—Action for Instalment — Counterclaim for Rescission of Contract — Mortgage and Transfer by Vendor Subsequent to Contract—Transfer in Trust — Judgment for Payment of Instalment into Court: Niblock v. Ross (Alta.), 792.

14. Contract for Sale of Land—Payment of Purchase Money by Instalments—Action to Recover Intermediate Instalment — Equitable Defence — Absence of Title in Vendor—Burden of Proof — Dismissal of Action —Leave to Commence a New Action: Graves v. Mason (Alta.), 542.

15. Contract for Sale of Land—Payment of Purchase Money by Instalments —Default — Forfeiture of Amounts Paid — Time of Essence — Resale—Express Agreement — Invalidity — Notice of Intention to Resell — Relief against Forfeiture — Specific Performance — Repayment of Moneys Paid — Liability of Vendor to Purchaser on Resale: Moodie v. Young (Alta.), 310.

16. Contract for Sale of Land—Payment of Purchase Money by Instalments—Default — Provision in Contract for Rescission of Agreement and Forfeiture—Void Clause—Remedy—Specific Performance or Sale in Default — Practice — Judgment — Default of Appearance—Judgment in Accordance with Statement of Claim — Notice of Motion — Service by Posting in Office of Clerk of Court —Relief other than as Claimed: Merriam v. Parish (Alta.), 340.

17. Contract for Sale of Land—Payment of Purchase Money by Instalments—Default — Time of Essence—Rescission — Waiver — Equity — Attornment Clause — Notice of Rescission—Agent of Purchaser — Return of Money Paid: Scott v. Milne (B.C.), 23.

18. Contract for Sale of Land—Payment of Purchase Money by Instalments — Default—Time of Essence—Right of Vendor to Rescind — Return of Instalment or Deposit Paid — Provision for Retention by Vendor — Penalty or Liquidated Damages — Forfeiture — Relief — Set-off — Damages — Depreciation in Property: Skinner v. Shirkey and Morris (Alta), 56.

19. Contract for Sale of Land—Payment of Purchase Money by Instalments —Default after First Payment — Inability of Purchaser to Complete —Cancellation of Contract—Return of Money Paid—Instalment not Forfeitable as Deposit—Deduction of Vendor's Damages for Loss of Sale —Depreciation of Property — Purchaser in Possession—Deduction for Occupation Rent and Costs—Land Titles Act — Caveat — Discharge: Tavender v. Edwards (Alta.), 308.

20. Contract for Sale of Land—Payment of Purchase Money by Instalments—Default by Purchaser after some Payments Made—Action to Recover Subsequent Instalments—Motion for Judgment—Remedy on Default of Payment — Rescission — Forfeiture — Relief against — Judicature Ordinance — Specific Performance — Sale of Land—Possession—Form of Judgment: Canadian Pacific R. W. Co. v. Meadows (Alta.), 806.

21, Contract for Sale of Land—Specific Performance — Payment of Instalment of Purchase Money to Vendor's Agent—Acknowledgment by Vendor under Seal — Estoppel — Fraud of Agent — Repudiation of Contract: Tuytens v. Noble (B.C.), 50.

22. Contract for Sale of Land—Substantial Deficiency in Acreage—Action by Purchaser for Specific Performance with Abatement in Price — Mutual Mistake — Executed Contract — Remedy — Rescission — Option — Election — Unfounded Allegation of Fraud — Costs: De Clerval v. Jones (Alta.), 300.

23. Contract for Sale of Land—Variation as to Terms—Written Memorandum — Construction — Specific Performance: Smith v. Livingstou (B.C.), 242.

24. Contract for Sale of Land—Want of Title in Vendor—Failure to Procure Title — Evidence — Damages for Breach of Contract — Loss of Increased Value of Land — Improvements: Hutchinson v. Schleuter (Sask.), 682.

25. Contract for Sale of Land—Written Agreement—Oral Evidence to Shew True Agreement — Admissibility — Agreement Partly Written and Partly Oral—Statute of Frauds—Rectification — Specific Performance: Anderson v. Douglas (Man.), 520.

26. Exchange of Lands—Fraud and Misrepresentation — Warranty as to Value of Land—Evidence — Verbal Representations — Reliance on Agent's Opinion—Action for Damages for Deceit: Mey v. Simpson (Man.), 472.

See Easement — Fraud and Misrepresentation, 1, 2—Judgment, 2—Principal and Agent.

VENDOR'S LIEN.

See Bankruptcy and Insolvency, 2.

VENUE.

See Practice, 4, 6.

VERDICT.

See Criminal Law, 8—New Trial.

VOTERS.

See Municipal Elections, 2.

WAGES.

See Lien—Master and Servant, 6, 7—Will, 2.

WAIVER.

See Arbitration and Award—Contract, 1, 7—Criminal Law, 12—Executors and Administrators, 1—Mechanics' Liens, 4—Partnership, 2—Practice, 6 — Promissory Notes, 4 — Vendor and Purchaser, 12, 17.

WAREHOUSE RECEIPTS.

See Negligence, 1.

WARRANT.

See Malicious Prosecution.

WARRANTY.

See Assessment and Taxes, 2—Easements—Sale of Goods, 1, 2, 8, 9, 10, 12—Vendor and Purchaser, 26.

WATER GRANTS.

See Mines and Minerals, 2.

WAY.

See Highway.

WILL.

1. Action for Revocation of Probate of Will and to Establish Later Will—Authenticity of Document Discovered Nine Years after Testator's Death—Evidence — Handwriting — Experts: Foulds v. Bowler (Man.), 189.

2. Legacy — Acceptance of — Liability of Legatee to Fulfil Conditions Imposed by Will — Parent and Child—Wages — Acquiescence: Gillespie v. Gillespie (Man.), 725.

See Executors and Administrators, 2.

WINDING-UP.

See Company.

WITNESS FEES.

See Costs, 2, 10.

WITNESSES.

See Promissory Notes, 1—Ship, 2.

WOODMEN'S LIEN FOR WAGES ACT.

See Lien.

WORDS.

"Action Founded on any Tort Committed within Manitoba"—See Service out of Jurisdiction.
"Action or Proceeding"—See Costs, 3.
"Actual Amount of Debt, Claim, or Demand Due and Owing"—See Attachment of Debts, 1.
"Amount Recovered"—See Costs, 6.
"Ceased to Furnish Materials" — See Mechanics' Liens, 6.
"Completion of the said Sale" — See Principal and Agent, 2.
"Contract Made in Connection with Business Carried on"—See Promissory Notes, 6.
"Costs, Fees, Counsel Fees, and Expenses of the Arbitration" — See Costs, 2.
"Debt or Liquidated Demand"—See Attachment of Debts, 3.
"Duly Commissioned and Instructed"—See Ship, 3.
"Filing"—See Mechanics' Liens, 6.
"Good Cause"—See Master and Servant, 3.
"Keep out of the Way"—See Ship, 2.
"Money Lender"—See Criminal Law, 9.
"Narrow Channels"—See Ship, 2.
"Occupant" — See Assessment and Taxes, 1.
"Ordinarily Resident"—See Costs, 8.
"Owners"—See Solicitor, 4.
"Proceeding in Respect of a Contract"—See Company, 2.
"Proceeding in the Court"—See Company, 2.
"Right to Commission"—See Principal and Agent, 1.
"Safe and Practicable"—See Ship, 2.
"Undertakers"—See Solicitor, 4.
"Woodman"—See Lien.

WORK AND LABOUR.

See Contract, 7, 8, 9.

WORKMEN'S COMPENSATION ACT.

See Master and Servant, 3—Solicitor, 4.

WRIT OF SUMMONS.

See Practice, 5, 6, 7—Service out of Jurisdiction.

YUKON TERRITORIAL COURT.

See Appeal—Executors and Administrators, 3—Mines and Minerals, 1.

END OF VOLUME VIII.

Stanford Law Library
3 6105 062 556 118